89-1218

No. _____

In The

Supreme Court of the United States

October Term, 1989

CINEMA BLUE OF CHARLOTTE, INC.,
JIM ST. JOHN, CURTIS RENEE PETERSON,

Petitioners,

vs.

PETER S. GILCHRIST III, DISTRICT ATTORNEY OF THE 26TH PROSECUTORIAL DISTRICT, IN HIS OFFICIAL CAPACITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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106 pp

QUESTIONS PRESENTED

I.

IS A REQUEST TO A FEDERAL COURT BY A STATE CRIMINAL OBSCENITY DEFENDANT, TO ENJOIN THE THREATENED PROSECUTION OF THE STATE CRIMINAL DEFENDANTS' EXPERT WITNESSES, FOR CONDUCTING SOCIOLOGICAL STUDIES OF THE CONTEMPORARY COMMUNITY STANDARDS FOR USE IN THE DEFENSE TO THE UNDERLYING STATE CRIMINAL OBSCENITY PROSECUTION, UTILIZING THE ACTUAL MATERIALS ALLEGED TO BE OBSCENE, SUCH "PRACTICAL INTERFERENCE" OF A STATE CRIMINAL PROCEEDING TO REQUIRE THE FEDERAL COURT TO ABSTAIN PURSUANT TO *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

II.

MAY A FEDERAL COURT PROPERLY DECLINE TO ABSTAIN PURSUANT TO *YOUNGER*, UPON FINDING THAT THE FEDERAL PLAINTIFFS, WHO WERE DEFENDANTS TO A CRIMINAL OBSCENITY ACTION IN STATE COURT, WOULD BE UNABLE TO PREPARE A PROPER DEFENSE TO THE STATE CRIMINAL CHARGES, WITHOUT FEDERAL RELIEF ENJOINING THE PROSECUTION FROM THREATENING, ARRESTING OR PROSECUTING THE CRIMINAL DEFENDANTS EXPERT WITNESSES?

QUESTIONS PRESENTED – Continued

III.

ARE A STATE CRIMINAL DEFENDANTS SIXTH AMENDMENT AND DUE PROCESS RIGHTS VIOLATED BY THREATS OF A PROSECUTOR TO ARREST AND PROSECUTE THE CRIMINAL DEFENDANTS EXPERT WITNESSES, SHOULD THOSE EXPERTS UTILIZE MATERIALS ALLEGED TO BE OBSCENE IN SOCIOLOGICAL STUDIES FOR USE IN THE DEFENSE OF AN OBSCENITY PROSECUTION, AND, IF SO, DO THOSE CONSTITUTIONAL VIOLATIONS ARISE TO "BAD FAITH AND HARASSMENT" SUFFICIENT TO ALLOW A FEDERAL COURT TO ENJOIN SUCH THREATENED PROSECUTION, FREE FROM THE REQUIREMENT OF ABSTENTION PURSUANT TO *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

LIST OF PARTIES AND RULE 29.1

The Petitioners before this Court are CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENEE PETERSON. The Respondent before this Court is PETER S. GILCHRIST III, DISTRICT ATTORNEY OF THE 26TH PROSECUTORIAL DISTRICT, IN HIS OFFICIAL CAPACITY.

The Corporate Petitioner, CINEMA BLUE OF CHARLOTTE, INC., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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PETER S. GILCHRIST III, DISTRICT
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DISTRICT, IN HIS OFFICIAL CAPACITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 5, 1989.

OPINIONS BELOW

The Memorandum of Decision of the United States District Court for the Western District of North Carolina, Charlotte Division, entered on January 13, 1989, is

reported at 704 F.Supp 631 (W.D.N.C. 1989) and is reproduced as Appendix A, with that court's accompanying order of injunction (also dated January 13, 1989 and being reported at 704 F.Supp 631 (W.D.N.C. 1989)) reproduced as Appendix B. The opinion and order of reversal of the United States Court of Appeals for the Fourth Circuit, decided October 5, 1989, is reported at 887 F.2d 49 (4th Cir. 1989), and is reproduced as Appendix C. That court's order denying Petition For Rehearing With Suggestion For Rehearing In Banc is an unpublished order filed October 30, 1989, and is reproduced as Appendix D. The order of the District Court dismissing Petitioners claims, following reversal by the Fourth Circuit, is an unpublished order rendered December 7, 1989, and is reproduced as Appendix E.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on October 5, 1988. A timely filed Petition For Rehearing With Suggestion For Rehearing In Banc was denied on October 30, 1989. Appendix D. This Petition for Certiorari is filed within 90 days of that date. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, United States Code (42 U.S.C. 1983), and North Carolina General Statutes (N.C.G.S. 14-190.1, 15A-1442 and 15A-1443) are set forth as Appendix F.

STATEMENT OF THE CASE

At the time of filing of their federal complaint, Petitioners were Defendants in a criminal prosecution pending in the Superior Court of Mecklenburg County, North Carolina, charged with disseminating obscenity in violation of N.C.G.S. 14-190.1 (Appendix F), and with common law conspiracy to disseminate obscenity between October 1985 and June 1988. Respondent Gilchrist was the District Attorney charged with prosecuting Petitioners. Petitioners sought to defend, at the criminal trial, by offering expert witness testimony that the materials alleged to be obscene were not "patently offensive", nor "appealed to the prurient interest in sex", when judged by "contemporary community standards", all within the meaning of N.C.G.S. 14-190.1 (b) and (c).

To this end, Petitioners engaged Dr. Joseph Scott, Professor of Sociology at Ohio State University, among others, to conduct various studies of the contemporary community standards in Mecklenburg County, North Carolina (the relevant "community" at issue). Historically, sociological studies to determine "contemporary community standards" for use in criminal obscenity

actions have involved the use of public opinion polls, including telephone surveys[1]. However, in preparation for conducting a telephone survey to be used in the pending action, concern as to admissibility of such surveys was raised due to a recent line of appellate decisions calling into question, and, in fact, disapproving of certain definitions and descriptions [of the materials alleged to be obscene] as used in various sociological studies.[2]

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[1] See, for example, *Saliba v. State of Indiana*, 475 N.E.2d 1181 (Ind. App. 2 Dist. 1985); *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978); *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988); *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190 (1976); *Carlock v. Texas*, 609 S.W.2d 787 (Tx. Cr.App. 1980); Tongg, *Criminal Law – State v. Kam: Do Community Standards on Pornography Exist?*, 9 U. Hawaii L.Rev. 727 (1987); Glassman, *Community Standards of Patent Offensiveness: Public Opinion Data and Obscenity Law*, 42 Pub. Opinion Q. 161 (1978); Beckett & Bell, *Community Standards: Admitting a Public Opinion Poll Into Evidence in an Obscenity Case*, 84 No. 2 Case and Comment 18 (1979).

[2] This concern was heightened by the fact that one of those appellate decisions emanated from the Supreme Court of North Carolina. See *State v. Anderson*, 322 N.C. 22, 32-34, 366 S.E.2d 459 (1988) ["Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary community standards would find magazines *limited exclusively to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse" to be patently offensive* . . . . At best, his study could be said to have focused on the availability of a *very broad range* of sexually oriented materials . . . ". (emphasis added)]; see also *United States v. Pryba*, 678 F.Supp. 1225, 1229-1239 (E.D. Va. 1988), appeal pending, ["To be admissible . . . a public opinion poll must be relevant; it must ask questions concerning the *materials involved* in the case or words that are 'clearly akin' to the charged materials. (citations omitted) . . . . The court has viewed all of these materials and is

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To control for this concern, Dr. Scott proposed, as was later found by the United States District Court;

> " . . . [t]o develop testimony on whether the materials at issue are obscene, as defined in N.C.Gen.Stat. § 14-190.1(b), by presenting some or all of the materials [alleged to be obscene] to 'focus groups,' randomly selected groups of Mecklenburg County adults for two main purposes. First, Dr. Scott will assess the attitudes of the focus group members towards the materials [alleged to be obscene] and then extrapolate from those findings, using sociological and statistical techniques, to a conclusion as to whether the materials are within the statutory definition of obscenity. Second, Dr. Scott proposes to use the focus groups to *validate certain language which specifically describes the nature and content of the sexual activity in the materials at issue.* This language will then be used in conducting telephone surveys of community attitudes towards the material." 704 F.Supp at 633 (Appendix A), at paragraph 6 (emphasis and clarification added).

On December 5, 1989, prior to argument regarding various pre-trial motions in the Mecklenburg Superior Court, the matter of these "focus group" studies was raised with Respondent Gilchrist, who indicated to defense counsel that the conducting of the "focus group" studies would be a criminal offense (for disseminating obscenity), and would subject Petitioners and their expert

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confident that *descriptive language fails to convey the impact of the visual image . . . . Thus, because interviewers were not sufficiently apprised of the nature of the charged materials,* the responses to the poll were irrelevant to the issues involved in this case."(emphasis added)].

witnesses to prosecution. Although there existed no explicit authority for the State court to grant protection to Petitioners and their expert witnesses, Petitioners orally moved for a protective order before the Honorable Judge Marvin Gray, presiding Judge in the Mecklenburg Superior Court. Judge Gray, however, orally denied this request, and, upon submission of a formal motion for protective order (Appendix G), filed a written order denying the requested relief. Appendix H.

On December 23, 1988, following Judge Gray's oral denial of Petitioners motion for protective order, and faced with a trial date certain of February 13, 1989 and an inability to take an immediate appeal as of right to the North Carolina Court of Appeals due to the interlocutory nature of Judge Gray's order, Petitioners filed a complaint for injunctive and declaratory relief, and a motion for preliminary injunction in the United States District Court for the Western District of North Carolina, pursuant to 42 U.S.C. § 1983, alleging deprivation of their civil rights in their inability to properly prepare for trial. The relief requested was the ability to conduct the "focus group" studies free from threat of criminal prosecution, there being *no* request made to either preclude or even stay the pending state obscenity prosecution. Appendix I.

Subsequent to Judge Gray's written order denying the Motion for Protective Order, Petitioners filed a First Amended Complaint with the Federal District Court, setting forth his formal denial. Appendix J. On January 10, 1989, the Honorable United States Federal District Judge James B. McMillan took evidence and heard arguments concerning Petitioners motion for preliminary injunction. At that hearing, Respondent Gilchrist testified that Dr.

Scott, the Petitioners, and their counsel had a legitimate apprehension of prosecution if they proceeded with the "focus group" studies. Dr. Scott's affidavit, outlining his concerns necessitating the use of the contemplated "focus group" studies, the procedures that he planned to employ in conducting those studies, his apprehension of prosecution, and his refusal to proceed with the contemplated research unless he was "assured that [his] participants and associates and [he] would be well protected against prosecution", was received into evidence. Appendix K. Judge McMillan also received evidence that while Gilchrist indicated he would prosecute Petitioners and their expert witnesses, should they go forward with the "focus group" studies, Gilchrist had failed to investigate and prosecute other instances of the display and dissemination of similar types of "sexually explicit" materials done for supposed scientific or educational purposes, involving a local anti-pornography group and a law enforcement workshop conducted at the University of North Carolina, Charlotte.

Judge McMillan then filed a Memorandum of Decision (Appendix A) and an order enjoining Respondent Gilchrist and his agents from arresting or prosecuting Petitioners, their attorneys or other persons exhibiting the materials alleged to be obscene (in the State court action) for the purposes of preparing a proper defense to the state felony obscenity charges. Appendix B.

On January 31, 1989, Respondent filed his notice of appeal with the United States Court of Appeals for the Fourth Circuit, and on February 6, 1989, filed a motion to stay preliminary injunction pending appeal, which was

granted by the Fourth Circuit on February 9, 1989. Following an expedited briefing schedule and oral arguments, the Fourth Circuit, by the Honorable Judge Phillips, reversed the District Court injunction, concluding that the Federal Court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Appendix C.[3] Petitioners then timely filed a Petition for Rehearing With Suggestion for Rehearing In Banc, arguing that *Younger* abstention was inapplicable to the instant action, and, in any event, that Petitioners had established that they would suffer sufficient "irreparable injury" to preclude *Younger* abstention. The Fourth Circuit denied this Petition for Rehearing on October 30, 1989 Appendix D. Pursuant to the directives of the Fourth Circuit, the District Court then entered an order on December 7, 1989,

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[3] While the "focus group" studies had commenced following the federal injunction, they immediately ceased upon entry of the stay by the Fourth Circuit. However, by that time, the studies were near completion, and sufficient data had been obtained to allow Petitioner's expert witnesses to reach various conclusions as to the relevant contemporary community standards, and to proffer such studies in the state prosecution. Because of this factual development, which obviously will not be found in the record of this case due to the timing of these developments, this Court may *sua sponte* consider the issue of mootness. Such a concern was raised but not addressed at, footnote 2 of the decision of the Fourth Circuit, 887 F.2d at 52. However, this issue is far from moot. Immediately following the decision of the Fourth Circuit, counsel for Petitioners requested assurances from Respondent that there would be no prosecutions for the conduct which occurred in conducting the "focus group" studies, with Respondent refusing to give any such assurances. See Appendix L. Therefore, the immediate threat of prosecution continues to exist.

dismissing Petitioners claims for injunctive and declaratory relief. Appendix E. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT COURT OF APPEALS DECISION REQUIRING ABSTENTION PURSUANT TO *YOUNGER V. HARRIS*, 401 U.S. 37 (1971) IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. *YOUNGER* ABSTENTION IS NOT APPLICABLE WHEN A FEDERAL COURT IS REQUESTED TO ENTER AN INJUNCTION (PURSUANT TO 42 U.S.C. § 1983) TO ENJOIN *THREATENED PROSPECTIVE PROSECUTION* OF CRIMINAL OBSCENITY DEFENDANTS EXPERT WITNESSES IN ORDER TO ALLOW THOSE WITNESSES TO CONDUCT PROPER SOCIOLOGICAL STUDIES, UTILIZING THE ACTUAL MATERIALS ALLEGED TO BE OBSCENE, IN PREPARATION FOR THE DEFENSE OF THE UNDERLYING STATE CRIMINAL OBSCENITY PROSECUTIONS.

In *Younger*, this Court noted that due to considerations of comity, Federal courts should abstain from staying or enjoining *"pending* state court proceedings except under special circumstances." 401 U.S., at 41. The Court specifically reserved consideration of the situation when there were no *pending* state court action at the time the Federal proceeding was begun. *Younger, supra*, at 41. Subsequently, this Court held that *Younger* abstention is not required in a suit for declaratory and/or injunctive relief when the relief sought is only to preclude future illegitimate prosecutions that have been threatened. *Doran v.*

Salem Inn, 422 U.S. 922, 930 (1975); *Ellis v. Dyson*, 421 U.S. 426, 432 (1975); *Allee v. Medrano*, 416 U.S. 802, 816-818 (1976); *Steffel v. Thompson*, 415 U.S. 452, 461-462 (1974). Here, Petitioners requested that from the Federal court, pursuant to 42 U.S.C. § 1983, enjoin *threatened future* prosecutions against Petitioners, their counsel and their expert witnesses in connection with the conducting of "focus group" studies utilizing material alleged to be obscene, in furtherance of preparation of their defense to the underlying state criminal obscenity actions. Petitioners did not request or seek a stay or injunction against the pending criminal obscenity prosecution. See Petitioners complaint, Appendix I. For just this reason, the District Court found abstention to be inapplicable. Appendix A.

Equity considerations involving a request for a federal injunction against *threatened* state prosecutions, and comity, "have little force in the absence of a pending state proceeding." *Lake Carriers Association v. McMullan*, 406 U.S. 498, 509 (1972). In *Doran, supra*, Plaintiffs Salem and Tim-Robb had been threatened with prosecution for presenting topless dancing, and rather than proceeding to flaunt the law and subject themselves to criminal prosecution, they sought relief in Federal court. This Court held *Younger* abstention inapplicable.

Here too, no state proceeding had been initiated against Petitioners or their expert witnesses for the *running of the "focus groups" studies*, at the time that Petitioners repaired to Federal court. In fact, no such prosecutions could have been initiated until such time as the "focus group" studies had commenced, which the

experts would not do without a protective order. Therefore, there would never be a *"pending"* State court action to enable Petitioners and their experts to defend themselves against prosecutions for conducting the "focus group" studies, since the conduct underlying such prosecutions would not have taken place without a federal injunction.

Similarly, in *Wooley v. Maynard*, 430 U.S. 705 (1977), Plaintiff there sought an injunction against *future* prosecutions for refusing to utilize an auto license plate that he believed violated his religious precepts. Chief Justice Burger, in upholding the federal injunction noted that:

> Here, however, this suit is in no way *"designed to annul the results of a state trial"* since the relief sought is wholly *prospective*, to preclude *further prosecution under a statute alleged to violate appellees' constitutional rights* . . . the [Plaintiffs] seek only to be free from prosecutions for *future violations* of the same statutes. *Younger* does not bar federal jurisdiction. *Wooley, supra*, at 711. (emphasis and clarification added).

Likewise, Petitioners here did not seek to "annul" any state proceeding, they merely sought to prevent [*future*] prosecutions of intended conduct. Nor is abstention mandated because the requested relief is, in some fashion, connected to a pending state prosecution. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court found abstention inapplicable in a federal action seeking an injunction against certain pretrial detention procedures, noting that the injunction was directed at those pretrial procedures, and not the state prosecution as such. *Id.*, at 108, fn. 9.

Here, the Fourth Circuit, although noting that [they] could *"point to no direct authority on the point,"* and that the District Courts' order did not "by its terms enjoin *or otherwise directly interfere* with the pending state prosecution," nonetheless concluded that the District Court's preliminary injunction worked "the sort of *practical interference* with an ongoing criminal state proceeding that *Younger* counsels against." 887 F.2d. at 53 (emphasis added). The Fourth Circuit based this conclusion on its belief that the injunctive decree would have the "practical effect" to "raise the specter of a federal pre-judgment that the evidence enjoyed some measure of federal constitutional protection that must be taken into account by any state court ruling on its admissibility under state rules of evidence." 887 F.2d at 53. It reached this conclusion without indicating how the state court judge would even come to know of the federal injunction, and purely speculated that such a state court judge would consider the federal injunctive decree to be some sort of federal "pre-judgment" of admissibility. What is most ironic about this spurious conclusion is that Judge McMillan, in his Memorandum of Decision of January 13, 1989, specifically addressed this point, concluding that:

> "This court does not hold that Plaintiffs' expert testimony must be admitted in the upcoming state criminal trial. Admissibility of evidence in Plaintiffs' criminal trial remains in the sound discretion of the Superior Court." 704 F.Supp. at 637.[4]

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[4] Further ignored by the Fourth Circuit was the following colloquy between the Federal District Judge and Respondents counsel at oral argument for consideration of the injunction:

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The Fourth Circuit cited to *O'Shea v. Littleton*, 414 U.S. 488 (1974) in concluding that the effect of the injunctive relief sought by the Petitioners would be a "federal audit" of the state criminal proceedings. 887 F.2d at 53. However, the circumstances at issue here and those faced by this Court in *O'Shea, supra*, are diametrically opposite.

In *O'Shea*, the Petitioners there claimed discriminatory enforcement of bond-setting, sentencing, and jury-fee practices. The federal injunction, there, would have involved "piece-meal interruptions" of the state proceedings to adjudicate certain assertions of non-compliance, and would have further required continuous supervision by the Federal court, including a "periodic reporting" system. *O'Shea, supra*, at 500-501. Here, however, there was absolutely no *request to interfere whatsoever* with the ongoing state court proceeding.

This is unlike the cases of *Perez v. Ledesma*, 401 U.S. 82 (1971) and *Hicks v. Miranda*, 422 U.S. 332 (1975), where this Court decreed that Federal courts should abstain from entering evidence suppression orders affecting state criminal proceedings. Rather than usurping the state court role of admissibility of evidence, the federal injunction sought by Petitioners simply afforded [Petitioners] the opportunity to gather evidence in furtherance of proffering it in the state proceeding.

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> The Court: I am not being asked to validate the admissibility of it, am I?
>
> Mr. White [Respondents counsel]: No, sir, I feel not . . . .

In addition, this is neither a situation in which Petitioners ignored potential state court proceedings in which to raise their concerns, nor is this a circumstance where Petitioners flaunted the law in order to file federal claim. Petitioners requested a protective order from the state court, even though there was no explicit authority to grant such an order. It was only after the state court refused to grant such a protective order that Petitioners sought relief in the District Courts. Thus, Petitioners were faced with defending themselves in a criminal obscenity action without the ability to prepare a proper defense, or flaunting the law in an attempt to prepare their defense, with the admitted likelihood of criminal prosecution for doing so. This Court has long held that it is not necessary to subject oneself to criminal prosecution to be entitled to challenge, in Federal Court, a statute that deters exercise of constitutional rights. As this Court has noted:

> [A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

As Petitioners sought equitable relief from the Federal Court prior to engaging in any conduct that would have given rise to subsequent prosecutions, the doctrine of *Younger* abstention is clearly inapplicable.[5]

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[5] In addition, since the "focus group" studies were completed to such an extent, by the time of the stay by the Fourth

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B. ASSUMING FACIAL APPLICATION OF *YOUNGER* ABSTENTION, THE FEDERAL DISTRICT COURT PROPERLY DECLINED TO ABSTAIN, GIVEN ITS FINDING OF REQUISITE "IRREPARABLE INJURY" BOTH "GREAT AND IMMEDIATE."

In *Younger*, this Court reiterated its judicial exception to federal abstention in circumstances in which an individual establishes that [he] will suffer *irreparable damages* if a State prosecution is not enjoined. *Younger, supra*, at 43, citing *Ex Parte Young*, 209 U.S. 123 (1908). To preclude abstention, the alleged irreparable injury must be "both great and immediate," *Younger, supra*, at 45, and must be a threat to Plaintiff's federally protected rights such that the threat "cannot be eliminated by his *defense* against a *single* criminal prosecution." *Younger, supra*, at 46, citing *Ex Parte Young*, 209 U.S. at 145-147 (emphasis added). The

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Circuit, to be able to be utilized in the state court obscenity prosecution (see fn 3, *supra*), there is no longer any ability to have Petitioners claims adjudicated in state court by appeal. The "focus group" studies were, in fact, proffered at trial, and there has, thus, been no "prejudice" to Petitioners constitutional rights to prepare a proper defense so as to warrant review by the North Carolina Court of Appeals. See N.C.G.S. 15A-1442 and 15A-1443. Appendix F. Therefore, due to the unique circumstances of this action, Petitioners suggest that, as an alternative to granting Certiorari in this action, this Court remand this matter back to the District Court for reconsideration of the issue of abstention in light of the subsequent developments, and the inability to now raise the issue of the infringement of Petitioners due process and Sixth Amendment Rights in the North Carolina Appellate Courts.

threatened "irreparable injury" must be of such circumstances to establish "pressing need for immediate equitable relief." *Kugler v. Helfant*, 421 U.S. 117, 125 (1975).

Here, Petitioners asserted[6], and the District Court so found that great and immediate irreparable injury would result if Respondent was not enjoined.

In this regard, Judge McMillan stated:

> "In the absence of the preliminary injunction sought, *plaintiffs likely will suffer irreparable injury*. Without the injunction, plaintiffs will stand trial in state court without being able to offer expert testimony in their defense. If plaintiffs are convicted, the North Carolina appellate courts or the federal courts in a *habeas corpus* proceeding could conclude that the threatened prosecution of Plaintiffs' expert was unconstitutional and order a new trial. However, such relief probably would not be awarded until long after conviction. With each passing day, measurement of the "contemporary community

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[6] At paragraph 14 of its original complaint, Petitioners alleged that unless Respondent was enjoined, the evidence sought to be obtained, that being measurement of *contemporary* community attitudes (specifically regarding the materials alleged to be obscene), would so significantly change that "they will be *beyond recapture*." Appendix I (emphasis added). Dr. Scott substantiated this allegation by testifying in his Affidavit that unless the studies proceeded shortly, it would be difficult, if not impossible to accurately measure the contemporary community standards a year or more later (the time necessary to take an appeal). Appendix K, paragraph 11. Respondent Gilchrist did not refute this evidence before the Federal District Court.

> standards" which existed during the period February 1988 to June 1988, when plaintiffs disseminated the materials at issue, becomes more difficult. Community standards about what is obscene change over time. A delay of one or many more years in attempting to measure those standards as they existed in the relevant time period *may well make measurement impossible.*" 704 F.Supp at 635 (emphasis added). Appendix A.

There is nothing in the record to conclude that Judge McMillan's findings were clearly erroneous so as to warrant the reversal of such findings. F.R.C.P. 52(a). In fact, the Fourth Circuit failed to even address this point.

Rather, the Fourth Circuit erroneously based its determination of finding no "irreparable injury" on the sole fact that there would be no subsequent prosecutions unless the expert witnesses went forward with the "focus group" studies. Thus, the Fourth Circuit reasoned, since the *experts* could avoid "harm" of prosecution simply by not running the studies, there was no "immediate threat" of prosecution. The Fourth Circuit totally ignored, however, the irreparable harm to *Petitioners* found by Judge McMillan, that being the inability to present an adequate defense to the state prosecutions, and the inability to later (assuming the state court's decision to decline to enter a protective order was reversed on appeal) measure the contemporary community standards. Petitioners filed a Petition for Rehearing With Suggestion for Rehearing In Banc specifically addressing this concern. See Statement of Purpose for Rehearing, Appendix M. The Fourth Circuit, however, denied this Petition, without elaboration. Appendix D.

In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), where Petitioners there had requested a Federal injunction against state enforcement of various state subversive and communist control laws, this Court held that the District Court there had erred in holding that the complaint had failed to allege sufficient irreparable injury to justify equitable relief, as defense in the state criminal prosecutions there would not have assured adequate vindication of constitutional rights. *Dombrowski, supra*, at 485-486. Nor can the threat of irreparable injury to Petitioners here be adequately vindicated in defense of the state criminal proceedings. As this Court has noted:

> "The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection. *Fenner, supra*, at 243."

Petitioners cannot "set up and rely upon [their] defense in the state courts", as it is that defense, *itself*, which is being precluded by the threat of prosecution by the Respondent. In addition, dismissal of a federal suit action on the basis of abstention "naturally presupposes the opportunity to raise *and have timely decided* by a competent state tribunal the federal issues involved." *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977), citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Here, this matter could not be "timely heard" by the state tribunal due to the inability to take an interlocutory appeal of the state court's decision not to enter a protective order,[7] and due

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[7] The order denying protective order by Judge Gray, being a preliminary, non-final order, was not appealable as a matter

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to the ever changing contemporary community standards as was noted by the Federal District Court. Thus, any later state vindication of Petitioners due process and Sixth Amendment rights would come too late to then allow adequate measure of the contemporary community standards applicable to that prosecution. In any event, even were the North Carolina Appellate Courts to find a violation of Petitioners due process and Sixth Amendment rights, their is no certainty that such a finding would require a new trial, as Petitioners would have to establish "prejudice"[8] of the state courts' denial of the protective order.

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of right at that time. *Gundell v. Kimbrell*, 29 N.C. App. 586, 225 S.E.2d 127 (1976); *State v. Lance*, 1 N.C. App. 620, 162 S.E. 2d 154 (1968). Even if it could be assumed, arguendo, that Petitioners had an immediate right of appeal to the North Carolina Court of Appeals, this Court noted in *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) that, while under that very circumscribed set of circumstances, exhaustion of State Appellate remedy was necessary before seeking relief to the Federal Courts, this requirement did not apply if the Federal Petitioner found himself within one of the exceptions specified in *Younger*. Thus, since Petitioners showed, and the District Court so found "irreparable harm", one of the exceptions to *Younger* abstention, exhaustion of State Appellate remedies was not a prerequisite for Petitioners to be able to repair to the Federal Courts.

[8] "Prejudice" is defined in N.C.G.S. 15A-1443 as " . . . a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. 15A-1443(b). In addition, the burden of showing such prejudice would be upon Petitioners. Thus, Petitioners would be in the proverbial

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Nor can the threat to Petitioners' Federal Rights be "eliminated by [their] defense against a single prosecution." *Younger, supra*, at 46. Even were the North Carolina Appellate Courts to later determine that Petitioners had been denied their due process and Sixth Amendment Rights, this decision, alone, would neither preclude the arrest, prosecution, nor conviction of Petitioners, their experts, or even their attorneys for having participated or assisting in the "focus group" studies. In fact, Petitioners and their experts would likely find themselves embroiled in an endless loop of prosecutions brought for conducting studies for use in defense of prosecutions brought for conducting studies!

As this court has noted, the existence of irreparable injury is a matter to be determined carefully under the facts of each case. *Dyson v. Stein*, 401 U.S. 200, 203 (1971). Unlike *Dyson*, however, where there was no finding by the District Court of any irreparable injury, such a finding has been made here, establishing the need for immediate equitable relief, and, since the Fourth Circuit had no basis to, and in fact, did not reverse this finding, as such, abstention is not warranted. For this reason, this Petition for Certiorari should be granted.

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Catch-22 position of trying to establish that had the studies been conducted, there would be a reasonable possibility of a different result having been reached. Without the results of such studies (favoring Petitioners argument of non-obscenity), however, this burden of proof would be impossible to meet.

II.

THE THREATENED PROSECUTION OF A CRIMINAL DEFENDANTS' EXPERT WITNESSES FOR CONDUCTING SOCIOLOGICAL STUDIES OF CONTEMPORARY COMMUNITY STANDARDS, UTILIZING MATERIALS ALLEGED TO BE OBSCENE, FOR USE IN THE DEFENSE OF OBSCENITY PROSECUTIONS DIRECTED AT THOSE VERY MATERIALS, PRESENTS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

A. CONDUCTING PUBLIC OPINION STUDIES, UTILIZING MATERIALS ALLEGED TO BE OBSCENE FOR USE IN THE DEFENSE OF THE CRIMINAL OBSCENITY CHARGES DIRECTED AT THOSE VERY MATERIALS, IS CONSTITUTIONALLY PROTECTED FROM CRIMINAL PROSECUTION PURSUANT TO THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The confrontation and compulsory process clauses of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, constitutionalize the right "to make a defense", *California v. Green*, 399 U.S. 149, 176 (1970), which is also a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

"The constitution guarantees criminal defendants a meaningful opportunity to present a *complete defense*," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), citing *California v. Trombetta*, 467 U.S. 479, 485 (1984), and further guarantees a criminal defendants "access to evidence." *Trombetta, supra*, at 485, citing *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

In addition, a criminal defendant has a constitutional right not only to obtain critical evidence held by the government, but also to have that evidence tested by an expert of his choosing.[9] This right to "test the evidence" is no less compelling in a criminal obscenity action as it is in, for example, a narcotics prosecution.

Relevant to this inquiry is this Court's off-cited statement, for the proposition that affirmative expert witness testimony in a criminal obscenity action is not necessary once those materials are placed in evidence, that "[t]he films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). If the materials themselves are the best evidence of what they represent for the prosecution to attempt to prove [the materials'] obscenity (and therefore the Defendants guilt), they are, therefore, also the best evidence for the defendants in order to attempt to prove that those materials are not, in fact, obscene. Prosecuting Petitioners and their experts here for "exhibition of obscenity", were they to conduct "focus group" studies without a federal injunction, would be akin to prosecuting a chemist, working for a defendant in a narcotics prosecution, for possession of a controlled substance.[10] To deny defendants in a

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[9] See, for example, *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) [testing of bullet]; *State of South Dakota v. Hanson*, 278 N.W.2d 198 (S.D. 1979) [marijuana]; and *Smith v. Cada*, 562 P.2d 390 (C.A. Az. 1977) [blood tests].

[10] The difficulty, however, in a criminal obscenity action, is that the contraband nature of the materials cannot be determined through use of simple chemical analysis, but must, rather, be evaluated pursuant to "contemporary community standards."

criminal obscenity prosecution the ability to utilize the actual materials alleged to be obscene in conducting studies to determine the relevant contemporary community standards with specific regard to those materials, free from threat of criminal prosecution, constitutes a clear and unmistakable denial of [due process] fundamental fairness, and of a criminal defendants right to confront the evidence against him and to put on a complete defense.

In addition, the effect of the threats of criminal prosecution here, had not a federal injunction issued, would have been to render a defense witness (the expert witness conducting the public opinion surveys) unavailable. The government cannot, whether it be by threats or intimidation, render a defense witness "unavailable". To do so is a fundamental denial of due process. *United States v. Hendrickson*, 564 F.2d 197 (5th Cir. 1977); *United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973).

This Court has noted that the defense of a criminal prosecution "should be free to introduce appropriate expert testimony . . . ". *Kaplan v. California*, 413 U.S. 115, 121 (1973). In making this statement, this Court relied upon Justice Frankfurter's concurring opinion in *Smith v. California*, 361 U.S. 147 (1969) where he discussed:

> " . . . the right of one charged with obscenity – a right implicit in the very nature of the legal concept of obscenity – to enlighten the judgment of tribunal, be it jury or in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts . . . for community standards or the psychological or physiological consequences of

> question literature can as a matter of fact hardly be established except through experts." *Id.*, at 164-165.

Clearly the best way to "enlighten" the trier of fact concerning the contemporary community standards is by conducting studies of those community standards *utilizing the actual materials alleged to be obscene.* Otherwise, as noted in *Anderson* and *Pryba, supra,* there is the potential for relevance problems. Not only are the materials for the "focus group" studies presumptively protected by the First Amendment, *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 65-66 (1981), but, in addition, criminalization of such conduct deprives a criminal obscenity defendant of the fundamental right to assert the non-obscenity of the materials, and warrants this Court to address this serious threat to criminal defendant's basic constitutional rights.

B. THE DETERRENT EFFECT TO PETITIONERS' CONSTITUTIONAL RIGHTS TO PREPARE A PROPER DEFENSE, SUBSTANTIATES SUFFICIENT "BAD FAITH AND HARASSMENT" TO PRECLUDE ABSTENTION. IN ADDITION, THE LOWER FEDERAL COURTS ARE IN DISAGREEMENT REGARDING THE DEFINITION OF THE "BAD FAITH AND HARASSMENT" EXCEPTION TO *YOUNGER*, AND THIS COURT SHOULD TAKE THIS OPPORTUNITY TO CLARIFY ITS POSITION ON THIS ISSUE.

A prosecution taken in "bad faith" or to harass has long been an exception to the general rule of abstention. *Younger, supra,* at 46, citing *Beal v. Missouri Pacific Railroad Corporation,* 312 U.S 45, 49 (1941). Generally, this Court has defined "bad faith" as a prosecution taken "without hope of obtaining a valid conviction . . . " *Perez v.*

Ledesma, 401 U.S. 82, 85 (1971); *Kugler, supra*, at 124. As the Fifth Circuit Court of Appeals noted:

> "When the federal rights sought to be protected are the right not to be subjected to a bad faith prosecution or a prosecution brought for purposes of harassment, the right cannot be vindicated by undergoing the prosecution." *Shaw v. Garrison*, 467 F.2d 113, 122 fn. 11 (5th Cir. 1972), cert. denied, 409 U.S. 1024 (1972).[11]

Various Federal courts, however, have expounded upon this definition by indicating that the "bad faith and harassment" exception to *Younger* can be fulfilled when the cond ·ct of the government has the effect of deterring the exercise of constitutionally protected rights.[12] Some

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[11] This axiom is equally applicable to the violation of Petitioners equal protection rights as found by the Federal District Court. 704 F.Supp. at 636-637. Obviously, the right to be free from prosecutions denying Petitioners equal protections under the law cannot be vindicated by undergoing such a discriminatory prosecution.

[12] Certainly, there is no question that the threats of prosecution here had a deterrent effect against Petitioners exercise of their fundamental right to prepare a defense to the state criminal prosecution. In addition, the effect of the threats by the prosecution was and is to preclude the Petitioners, their expert witnesses and their other agents from showing, *in any context* (let alone the context of professional sociological studies in order to prepare a proper defense to the criminal obscenity actions) the materials alleged to be obscene. Such conduct is clearly an unconstitutional prior restraint in violation of this Court's decision of *Near v. Minnesota*, 283 U.S. 697 (1930). The circumstance of threatened prosecution for conducting of the "focus group" studies can be readily analogized

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courts have noted that such an effect arises to sufficient "bad faith and harassment", *without* any need for a showing that the prosecution was taken without hope of obtaining a valid conviction.[13]

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to this Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1971). In *Marcus*, this court invalidated search warrant procedures authorizing seizure of *all* copies of materials alleged to be obscene by noting that the opportunity, following initial seizure, to continue to circulate other copies of the books and then raise the claim of non-obscenity by way of defense to a prosecution had never been afforded those appellants since *all* copies of the materials had been seized. *Marcus, supra*, at 735-737. See also *Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The seizure of [allegedly obscene] materials, prior to an adversarily hearing on the issue of obscenity, either to destroy or to block the distribution of those materials is a different matter from seizing a single copy of the material for the bona-fide purpose of preserving it as evidence. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 328 (1979). The rationale against pre-adversarily determination seizures, and the prior restraint worked by this Respondents' threats of prosecution, is the same. There is a danger of abridgment of the right of the public "in a free society to unobstructed circulation of non-obscene books." *Quantity of Books, supra*, at 213. Assuming that the State's criminal obscenity actions go forward, and the materials that were to be subject of the focus group were adjudicated to be non-obscene, the unmistakable effect of Respondents' threats of prosecution would then have been to preclude exhibition of non-obscene materials in violation of the First Amendment.

[13] See, for example, *Lewellan v. Raff*, 843 F.2d 1103, 1109, 1112 (8th Cir. 1988) reh'g at 851 F.2d 1108 (1988), cert. denied 103 L.Ed.2d 229 (1989); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2nd Cir. 1979); *Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

Other courts have indicated that the prosecution must have been brought, *in part*, to deter protected conduct[14], with still others indicating that while the deterrent effect on protected conduct does not establish bad faith as a matter of law, such allegations serve to corroborate that the prosecution has been taken for an improper motive.[15] Others, including the Fourth Circuit, have retained the single definition of a prosecution taken without expectation of obtaining a valid conviction.[16]

Due to the discrepancy of these definitions of the "bad faith and harassment" exception to *Younger* abstention, this Court should take this opportunity to provide clear direction to the lower Federal Courts to provide a uniform interpretation of this exception.

The need for such direction is illustrated no better than in this action. While other Circuits have expanded this definition of bad faith and harassment to include the deterrent effect upon the exercise of constitutional rights, apparently, the Fourth Circuit has not. While acknowledging the standard definition for "bad faith" as a prosecution brought without a reasonable expectation of obtaining a valid conviction, the Fourth Circuit has defined "harassment" as meaning "much the same, although it also connotes a legal exercise of authority in such a manner as to be unnecessarily oppressive." *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975).

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[14] *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979).

[15] *Wichert v. Walter*, 606 F.Supp. 1516, 1522 fn. 2 (D.C.N.J. 1985).

[16] *Suggs v. Brannon*, 804 F.2d 274, 277 (4th Cir. 1986); *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975).

In the instant case, the Fourth Circuit simply dismissed consideration of this exception by noting that there was no claim by Petitioners that any threat of prosecution would be undertaken in "bad faith that is, 'without a reasonable expectation of obtaining a valid conviction' . . . ", without looking at all as to the deterrent effect to Petitioners' constitutional rights by the threatened prosecution. 887 F.2d at 54. Therefore, assuming application of *Younger* abstention, this matter should at least be remanded for the District Court to make a determination as to the application of the "bad faith and harassment" exception, utilizing the concepts of deterrence to the exercise of constitutional rights, improper motivation and impermissible purpose.

CONCLUSION

For all the reasons noted above, this Court should accept this case for review in order to send a clear message that the threatening of criminal prosecution of expert witnesses attempting to evaluate contemporary community standards for the defense in an obscenity prosecution, may not be constitutionally used as part of a prosecutors arsenal of weaponry for the control of materials alleged to be obscene. Such threats unmistakably deprive a criminal defendant of his constitutional rights under the Fifth and Sixth Amendments of the United States Constitution to confront the evidence against him and to prepare a proper defense. The threat to these constitutional principles, along with the discrepancies in the lower Federal courts as to the proper interpretation of the "bad faith and harassment" exception to *Younger*

abstention, warrant this Court's review to end this most serious threat to constitutional liberties.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-88-557-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON, Plaintiffs, -vs- PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity, Defendant.	*MEMORANDUM OF DECISION* (Filed Jan. 13, 1989)

On December 23, 1988, plaintiffs filed this action pursuant to 42 U.S.C. § 1983, alleging that defendant has deprived them of their rights under the First, Sixth and Fourteenth Amendments. In the complaint, plaintiffs seek declaratory relief and have moved that, pending final trial and determination, the court preliminarily enjoin defendant. Plaintiffs' motion for preliminary injunction was heard on January 10, 1989.

FINDINGS OF FACT

1. Plaintiff Cinema Blue of Charlotte, Inc. ("Cinema Blue"), is a corporation organized under the laws of North Carolina, and has the capacity to sue in its own name; Plaintiffs Jim St. John ("St. John") and Curtis Rene

Peterson ("Peterson") are citizens and residents of Michigan.

2. Defendant Peter S. Gilchrist, III ("Gilchrist"), is the duly elected District Attorney for the Twenty-Sixth Prosecutorial District, State of North Carolina, and is being sued in his official capacity. The Twenty-Sixth Prosecutorial District is comprised of Mecklenburg County, North Carolina. Defendant is "responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." N.C. CONST. art. IV, § 18.

3. Plaintiffs have been charged with multiple counts of disseminating obscenity, a felony under N.C.Gen.Stat. § 14-190.1 (1986), and with conspiring to disseminate obscenity. Plaintiffs are scheduled to be tried on these charges in the Superior Court of Mecklenburg County, North Carolina, beginning on February 13, 1989.

4. Under North Carolina law, material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value. . . .

N.C.Gen.Stat. § 14-190.1(b)(1-3).

5. Plaintiffs wish to defend against the obscenity charges at their trial in state court by offering expert testimony that the videotapes and magazines at issue are

not obscene. Plaintiffs have engaged Dr. Joseph E. Scott, Associate Professor of Sociology at Ohio State University, as one of their experts in the state court criminal cases.

6. Dr. Scott proposes to develop testimony on whether the materials at issue are obscene, as defined in N.C.Gen.Stat. 14-190.1(b), by presenting some or all of the materials to "focus groups," randomly selected groups of Mecklenburg County adults, for two main purposes. First, Dr. Scott will assess the attitudes of the focus group members toward the materials and then extrapolate from those findings, using sociological and statistical techniques, to a conclusion as to whether the materials are within the statutory definition of obscenity. Second, Dr. Scott proposes to use the focus groups to validate certain language which specifically describes the nature and content of the sexual activities in the materials at issue. This language then will be used in conducting telephone surveys of community attitudes toward the materials.

7. On December 5, 1988, the Honorable Marvin. K. Gray, Superior Court Judge, heard all pending motions in the state criminal prosecutions. On the morning of December 5, plaintiffs told defendant Gilchrist of their plans to develop expert testimony by exhibiting the materials at issue to focus groups conducted by Dr. Scott. Defendant Gilchrist told plaintiffs' counsel that exhibition of the materials at issue by plaintiffs' expert to focus groups in Mecklenburg County would be illegal. Gilchrist refused to agree to the entry of a court order allowing plaintiffs' expert to display the materials to members of the public. Gilchrist also refused to agree not to prosecute plaintiffs' expert.

8. During argument on the pending motions, plaintiffs moved orally that the Superior Court enter a protective order enjoining prosecution of Dr. Scott for dissemination of obscenity if he exhibited the materials to focus groups. In response to the oral motion, defendant Gilchrist confirmed to the court that, in his opinion, dissemination of the materials at issue in the criminal prosecutions to the public by plaintiffs' expert would be illegal. The court denied the motion for protective order from the bench. On December 20, 1988, plaintiffs, by leave of the Superior Court, filed the motion for protective order in written form. The Superior Court denied the motion in an order filed December 30, 1988.

9. At the January 10 hearing in this court, defendant Gilchrist testified that he still believes that exhibition of the materials by plaintiffs' expert in preparation of their defense is illegal. Defendant conceded that plaintiffs' apprehensions of prosecution are reasonable.

10. There are twelve different magazines and motion pictures at issue in the state criminal prosecutions. In the complaint plaintiffs alleged that none of the materials at issue in the state criminal prosecutions had been judged obscene in the pending prosecutions "or in any other action of which Plaintiffs are advised." Defendant introduced evidence that five of the materials in the pending prosecutions have been judged obscene in two related prosecutions. Plaintiffs concede that defendant is correct and have limited their request for preliminary relief and declaratory relief to the remaining seven materials.

11. Dr. Scott has refused to proceed with the development of expert testimony, if he will be subject to prosecution by defendant.

12. The Concerned Charlotteans are a group founded in early 1984 to address to [sic] the pornography issue and other moral issues which affect the Charlotte community. The group has engaged in political and religious opposition to pornography. The group has attempted to educate the public about what materials are being disseminated in the community. In 1985, the group held an exhibition at First Baptist Church in Charlotte. Joseph R. Chambers, President of the Concerned Charlotteans, testified in this court that "sexually explicit" material was displayed at the exhibition; however, he could not recall clearly the nature and extent of the sexual conduct depicted in the materials. Robert F. Thomas, an attorney with the Charlotte Police Department, attended the exhibition and viewed some of the materials, none of which he judged to be obscene. Defendant Gilchist [sic] was aware that the exhibition was held, but took no steps to investigate or prosecute.

13. In March, 1984, or March, 1985, the University of North Carolina at Charlotte Department of Criminal Justice, the Charlotte Police Department and the Federal Bureau of Investigation sponsored a workshop on the interrelationship of the problems of missing children, child pornography and serial murders. Sexually explicit material, which included deviant homosexual acts with children, was displayed at the workshop, Although not generally publicized. the exhibition was essentially open to the public. Law enforcement officials in the Charlotte area, UNCC students and the press specifically were

invited to the workshop. The defendant's office may have received an invitation. This is the only evidence presently on the record that defendant had knowledge of the workshop. The defendant took no action to investigate or prosecute the sponsors of the workshop.

CONCLUSIONS OF LAW

The court first must decide whether it may issue any ruling in this action. Defendant argues that the court should abstain; that is, "dismiss or postpone decision of a controversy clearly within its jurisdiction, in deference to a possible decision by a state court." McMillan, "Abstention – The Judiciary's Self-Inflicted Wound," 56 N.C.L. Rev. 527 (1978). The court's initial reaction to the complaint was to abstain. However, in this case, abstention is not appropriate. Plaintiffs are not asking the court to enjoin prosecution of the obscenity charges against them scheduled for trial commencing February 13, 1989. If asked, the court would abstain from enjoining those pending state court criminal prosecutions. *Younger v. Harris*, 401 U.S. 37 (1971). Instead, plaintiffs are asking the court to enjoin the *threatened prosecution of their expert if he aids them in their defense against those charges*. The court may properly enjoin threatened criminal prosecutions. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). Thus, the court will not abstain.

In *Doran*, the Supreme Court restated the traditional standard for granting a preliminary injunction.

> The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is

> likely to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides.

422 U.S. at 931. The Fourth Circuit has elaborated on the traditional standard for issuing preliminary injunctions and the need for balancing the interests of the parties. *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977).

The correct trial court standard in the Fourth Circuit for interlocutory injunctive relief is the balance-of-hardship test. *Blackwelder*, 550 F.2d at 194, 196. "The balance-of-hardship test correctly emphasizes that, where *serious* issues are before the court, it is a sound idea to maintain the *status quo ante litem* provided that it can be done without imposing too excessive an interim burden upon the defendant. . . ." *Blackwelder*, 550 F.2d at 194-95 (citations omitted) (emphasis in original). The decision to grant or deny a preliminary injunction depends on the "flexible interplay" of four factors: (1) probable irreparable injury to plaintiff without a decree; (2) likely harm to defendant with a decree; (3) likelihood of success on the merits; and (4) the public interest. *Blackwelder*, 550 F.2d at 196. In applying the balance-of-hardship test,

> the first step in a Rule 65(a) situation is for the court to balance the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor . . . ' it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.'

Blackwelder, 550 F.2d at 195 (quoting *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953)).

"[T]he requirement of irreparable harm must also be evaluated within the basic context of the balance-of-hardship test." *Blackwelder,* 550 F.2d at 196. The *Blackwelder* court emphasized that irreparable injury is a question of relative harm to the plaintiff.

> [W]hile 'irreparability' may suggest some minimum of probable injury which is required to get the court's attention, the more important question is the *relative* quantum and quality of plaintiff's harm. The decision to grant preliminary relief cannot be intelligently made unless the trial court knows how much the precaution will cost the defendant. If it costs very little, the trial court should be more apt to decide that the threatened injury is 'irreparable' for purposes of interlocutory relief.

Id. (emphasis in original).

The interplay of irreparable harm and likelihood of success also is a continuum. "The importance of probability of success increases as the probability of irreparable injury diminishes . . . and where the latter may be characterized as simply 'possible,' the former can be decisive." *Blackwelder,* 550 F.2d at 195. The probability of success begins to assume real significance when the balance of hardship stands at equipoise. *Blackwelder,* 550 F.2d at 195 n.3.

In the absence of the preliminary injunction sought, plaintiffs likely will suffer irreparable injury. Without the injunction, plaintiffs will stand trial in state court without being able to offer expert testimony in their defense. If plaintiffs are convicted, the North Carolina appellate

courts or the federal courts in a *habeas corpus* proceeding could conclude that the threatened prosecution of plaintiffs' expert was unconstitutional and order a new trial. However, such relief probably would not be awarded until long after conviction. With each passing day, measurement of the "contemporary community standards" which existed during the period February, 1988, to June, 1988, when plaintiffs disseminated the materials at issue, becomes more difficult. Community standards about what is obscene change over time. A delay of one or many more years in attempting to measure those standards as they existed in the relevant time period may well make measurement impossible.

Issuance of a preliminary injunction will impair the State's interest in enforcing its criminal laws. However, if this court were to enter final judgment that the threatened prosecution of Dr. Scott is constitutional, defendant Gilchrist would have suffered no more than a temporary delay in prosecuting him. Also, the State will not be prevented by a preliminary injunction from prosecuting persons other than Dr. Scott for disseminating obscenity.

The court concludes that the balance of harm tilts in plaintiffs' favor. Therefore, the remaining question is whether plaintiffs have raised serious questions which are fair ground for litigation. The court will address each of plaintiffs' theories of relief below.

Plaintiffs allege that the threatened prosecution of Dr. Scott deprives them of their right under the Sixth Amendment and the due process clause of the Fourteenth Amendment to offer testimony in their state court criminal trial. The Supreme Court has described what it

regards as the most basic ingredients of due process of law:

> A person's right to reasonable notice of a charge against him, and an opportunity. to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948). The right of criminal defendants to offer testimony of witnesses is also guaranteed by the Sixth Amendment, as incorporated in the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

The Supreme Court held in *Roth v. United States*, 354 U.S. 476 (1957), that obscenity is not protected speech under the First Amendment. In an early obscenity case after *Roth*, Mr. Justice Frankfurter discussed the "right of one charged with obscenity . . . to enlighten the judgment of the tribunal . . . and to do so through qualified experts," *Smith v. California*, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring); he concluded that the right

to introduce expert testimony is a requirement of due process in obscenity prosecutions. *Id.* at 167.

Citing Mr. Justice Frankfurter's concurring opinion in *Smith*, the Supreme Court has held that "[t]he defense should be free to introduce appropriate expert testimony" in obscenity prosecutions. *Kaplan v. California*, 413 U.S. 115, 121 (1973). The North Carolina Supreme Court has recognized the *Kaplan* holding. *State v. Anderson*, 322 N.C. 22, 27-28, *cert. denied*, 109 S.Ct. 513 (1988). Since defendant's threatened prosecution of Dr. Scott directly inhibits plaintiffs' right to develop appropriate expert testimony, the court concludes that plaintiffs have not only raised a serious constitutional question but have made a strong showing of probability of success on the merits at trial.

Plaintiffs, citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), also assert that defendant has violated the equal protection clause of the Fourteenth Amendment by threatening to enforce the North Carolina obscenity statute in a discriminatory fashion. In *Yick Wo*, the Supreme Court held:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo, 118 U.S. at 373-74.

By implication, *Yick Wo* makes prosecutorial discrimination unconstitutional if it is "deliberately based upon

an unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Defendant has failed to prosecute a citizens' group, a local educational institution, and law enforcement agencies, who may have disseminated obscene material in an effort to educate the public, while threatening to prosecute persons who exhibit allegedly obscene material in order to "enlighten the judgment of the tribunal" in an obscenity prosecution. This is an unjustifiable standard for the exercise of prosecutorial discretion, if plaintiffs supplement their showing at trial that this discrimination is deliberate. Thus, plaintiffs have raised a serious constitutional question which is fair ground for litigation.

Finally, plaintiffs allege in the complaint that defendant's threatened prosecution deprives them of their First Amendment right to freedom of speech. Plaintiffs failed to address this claim in their brief in support of the motion for preliminary injunction and at the hearing; therefore, the court does not decide that issue.

The court concludes that plaintiffs' motion for a preliminary injunction should be granted. Defendant, by his threat of prosecution, in essence has usurped the role of the trial judge in determining what evidence may be presented to the jury. This court does not hold that plaintiffs' expert testimony must be admitted in the upcoming state criminal trial. Admissibility of evidence in plaintiffs' criminal trial remains in the sound discretion of the Superior Court. However, this court today affirms that, pending final determination of this action, plaintiffs should be free to develop appropriate expert testimony, without the threat of prosecution by defendant.

An appropriate order will be entered.

This 13 day of January, 1989.

/s/ James B. McMillan
James B. McMillan
United States District Judge

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-88-557-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON,

Plaintiffs,

-vs-

PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity,

Defendant.

ORDER

(Filed Jan. 13, 1989)

On January 10, 1989, the court heard plaintiffs' motion for preliminary injunction. For the reasons outlined in a separate memorandum of decision, the motion hereby is GRANTED.

IT IS THEREFORE ORDERED that:

1. Defendant Gilchrist, his officers, agents, servants, employees and attorneys, and those in active concert or participation with him who receive actual notice of this order by personal service or otherwise, are ENJOINED, pending entry of final judgment in this action, from arresting or prosecuting plaintiffs, their attorneys, or any other persons who exhibit the materials listed in Exhibit A to adults who consent to view the materials and do view them for the purpose of preparing plaintiffs' defense to felony obscenity charges which are presently

scheduled to be tried in the Superior Court of Mecklenburg County, North Carolina, commencing February 13, 1989.

2. Plaintiffs are not required to give security for the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained.

This 13 day of January, 1989.

/s/ James B. McMillan
James B. McMillan
United States District Judge

EXHIBIT A

1. A video taped motion picture entitled *Video Games, Volume X, Cum & Cum Again III.*
2. A video taped motion picture entitled *The Big Switch.*
3. A video taped motion picture entitled *Penetration 2.*
4. A video taped motion picture entitled *Unnatural Phenomenon.*
5. A video taped motion picture entitled *How To Get A 'head'.*
6. A video taped motion picture entitled *Cum Shot Revue, Volume Four.*
7. A magazine entitled *Pregnant & Sexy!*

APPENDIX C

CINEMA BLUE OF CHARLOTTE, INCORPORATED; Jim St. John; Curtis Rene Peterson, Plaintiffs-Appellees,

v.

Peter S. GILCHRIST, III, Defendant-Appellant.

No. 89-1415.

United States Court of Appeals, Fourth Circuit.

Argued April 13, 1989.

Decided Oct. 5, 1989.

Before PHILLIPS, MURNAGHAN and WILKINS, Circuit Judges.

PHILLIPS, Circuit Judge:

Peter S. Gilchrist, III, District Attorney for the Twenty-Sixth Prosecutorial District of the State of North Carolina, appeals a district court order awarding preliminary injunctive relief to the plaintiffs, Cinema Blue of Charlotte, Inc., Jim St. John and Curtis Rene Peterson (collectively, "Cinema Blue"), in this action under 42 U.S.C. § 1983. The challenged injunction prohibited "Gilchrist, his officers, agents, servants, employees and attorneys, and those in active concert or participation with him . . . from arresting or prosecuting plaintiffs, their attorneys, or any other persons" who might exhibit certain allegedly obscene materials "to adults who consent to view the materials and do view them for the purpose of preparing plaintiffs' defense to felony obscenity charges" which were then "scheduled to the tried on

indictments against Cinema Blue in the Superior Court of Mecklenburg County, North Carolina, commencing February 13, 1989." *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 704 F.Supp. 631, 632 (W.D.N.C.1989).

Because we think that the district court should have abstained from interfering with a pending state proceeding, we vacate its injunction and remand the case for entry of any order dismissing the plaintiffs' claims for injunctive and declaratory relief.

I

The relevant facts are not in dispute. At the time the district court issued the challenged injunction, the appellees were under indictment on multiple charges that they had disseminated various purportedly "obscene" materials, in violation of N.C.G.S. § 14-190.1. The criminal case had not yet gone to trial and the parties were still in the midst of pretrial proceedings. Cinema Blue had already made clear, however, that it would defend the felony charges by, *inter alia*, presenting expert, testimony that the materials described in the indictment were not "obscene" within the meaning of the statute.

The parties' dispute is essentially one over the way in which the appellees intended to lay the foundation for the expert's testimony. Under the applicable provisions of the state statute, sexually explicit material constitutes "obscenity" if it is "patently offensive," "appeals to the prurient interest in sex" as judged by "contemporary community standards," and "lacks serious literary, artistic, political, or scientific value." *Id.* §§14-190.1(b)(1)-(3). On the premise that it would become critical at trial to

adduce proof of "community attitudes," therefore, Cinema Blue engaged Dr. Joseph E. Scott, Associate Professor of Sociology at the Ohio State University, as one of their experts. What we are now told is that Professor Scott intended to develop [his] testimony on whether the materials at issue are obscene, as defined in N.C.[G.S.] § 14-190.1(b), by presenting some or all of the materials to "focus groups" [–] randomly selected groups of Mecklenburg County adults [–] for two main purposes. First, Dr. Scott will assess the attitudes of the focus group members toward the materials and then extrapolate from those findings, using sociological and statistical techniques, to a conclusion as to whether the materials are within the statutory definition of obscenity. Second, Dr. Scott proposes to use the focus groups to validate certain language which specifically describes the nature and content of the sexual activities in the materials at issue. This language then will be used in conducting telephone surveys of community attitudes toward the materials.

Joint Appendix at 79.

On December 5, 1988, shortly before a scheduled hearing on various motions pending in connection with the criminal prosecution, counsel for Cinema Blue informed Gilchrist of the particulars of Dr. Scott's "focus group" proposal. Gilchrist immediately expressed concern that the proposed focus group exhibition would itself constitute a violation of the state obscenity statute Cinema Blue therefore raised the matter at the motions hearing and asked the state court to enter a protective order enjoining any prospective prosecution of Dr. Scot if he indeed exhibited the materials for the purpose of developing his expert testimony. In response to inquiries

from the court, Gilchrist again opined that any such exhibitions would be illegal, and that the state would be entitled to prosecute Scott if he proceeded as planned. Ruling from the beach, the state court in turn denied Cinema Blue's motion for a protective order.[1]

On December 22, 1988, the appellees filed the present action under 42 U.S.C. § 1983, seeking both injunctive and declaratory relief. They claimed that, in light of Gilchrist's implied threat to prosecute, Dr. Scott had declined to proceed with his focus group study. As a result, Cinema Blue assertedly could not prepare an adequate defense against the state prosecution. Gilchrist's threats of prosecution – together of course with the state court's refusal to grant the requested protective order – therefore effected an actionable deprivation of the appellees' rights under the Sixth and Fourteenth Amendments to present witnesses on their behalf.

Plaintiffs also claimed that Gilchrist had previously *declined* to prosecute various anti-pornography groups and educational institutions that had exhibited the materials at issue in the pending state court proceedings against Cinema Blue. Any action ultimately taken against Dr. Scott would therefore constitute an "arbitrary" and "discriminatory" exercise of prosecutorial discretion, hence a *per se* violation of the equal protection clause of the Fourteenth Amendment.

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[1] On December 20, 1988, Cinema Blue renewed its motion for a protective order and filed various papers apparently meant to preserve a record of the state court's earlier bench ruling. The State court denied the renewed motion in a written order dated December 30, 1988.

On January 10, 1989, the district court conducted a hearing on Cinema Blue's motion for a preliminary injunction against the threatened prosecution of Dr. Scott or "any other persons who exhibit the materials [at issue in the state prosecution] . . . for the purpose of preparing [Cinema Blue's] defense." Gilchrist conceded at the hearing that the state court had made clear its unwillingness to grant the requested relief, and that Dr. Scott indeed risked prosecution if he conducted the proposed focus group study.

Three days later, the district court issued an order granting Cinema Blue's motion for preliminary injunctive relief. In an accompanying opinion, the court held that " '[t]he defense should be free to introduce appropriate expert testimony' in obscenity prosecutions." *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 704 F.Supp. 631, 636 (W.D.N.C.1989) (hereinafter *Cinema Blue*) (quoting *Kaplan v. California*, 413 U.S. 115, 121, 93 S.Ct. 2680, 2685, 37 L.Ed.2d 492 (1973)). Here, Gilchrist's "threatened prosecution of Dr. Scott directly inhibit[ed] plaintiffs' right to develop appropriate expert testimony," and therefore deprived Cinema Blue of its Sixth Amendment right to present an adequate defense. *Id.*, 704 F.Supp. at 636. The court found, moreover, that Gilchrist

> ha[d] failed to prosecute a citizens' group, a local educational institution, and law enforcement agencies, who may have disseminated obscene material in an effort to educate the public, while threatening to prosecute persons who exhibit allegedly obscene material in order to "enlighten the judgment of the tribunal" in an obscenity prosecution. This is an unjustifiable standard for the exercise of prosecutorial discretion. . . .

Id., at 637 (quoting *Smith v. California*, 361 U.S. 147, 164-65, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959) (Frankfurter, J., concurring)).

In the district court's view, plaintiffs had therefore "raised questions going to the merits" of their claim for declaratory relief that were "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir.1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir.1953)). Also present here was a substantial likelihood that, "[i]n the absence of the preliminary injunction sought, plaintiffs [would] suffer irreparable injury," inasmuch as "[w]ith each passing day, measurement of the 'contemporary community standards' which existed . . . when plaintiffs disseminated the materials at issue[] becomes more difficult." *Cinema Blue*, 704 F.Supp. at 635. Cinema Blue was therefore entitled to injunctive relief, *See Blackwelder*, 550 F.2d at 195-96, in the form of an order prohibiting Gilchrist or his "agents" from prosecuting Dr. Scott or others who exhibited the allegedly obscene materials solely for the purpose of preparing the federal plaintiffs' defense.

On January 30, 1989, the district court denied Gilchrist's motion for a stay of the preliminary injunction, this appeal followed, we expedited it, and on February 9,

1989, we stayed the district court's injunction pending the appeal.[2]

II

This action sought to raise difficult and important questions respecting the nature and quality of a

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[2] Events that occurred during the pendency of this appeal have raised mootness issues sufficiently worrisome that we have considered them *sua sponte*. From various filings with this court it appears that before we issued our February 9, 1989, stay of the district court's preliminary injunction, hence while its protections remained in force, plaintiffs' retained expert witness conducted the controlled showings to "focus groups" of allegedly obscene materials that were said to be required to develop his expert opinion testimony. If that be the case, it is obviously arguable that the federal plaintiffs' constitutional claims of entitlement to the testimony of witnesses in their behalf may have been mooted by procurement of the evidence – inasmuch as their claims at this point could go only to its procurement, not its ultimate admission on trial. *Cf. United States v. (Under Seal), in re Grand Jury Proceedings, John Doe # 462*, 757 F.2d 600 (4th Cir.1985) (case mooted by events during pendency of appeal that made judicial remedy impossible). What may later have happened with any efforts to introduce the evidence in the state court proceeding is not before us, and in any event is irrelevant to the specific federal claim in this action solely concerned with preparing the evidence.

Despite these serious questions, we have nevertheless concluded, as a prudential matter, that the case should not be dismissed as moot, in view of the uncertainties on this appellate record as to the exact circumstances and timing of the arguably mooting events. Obviously, if for any reason any prosecutable conduct occurred outside the unstayed injunction's protection, or if our stay cut short what arguably was further need for the procurement of evidence, the claim was not mooted. We simply are in no position to make a confident judgment on those points.

defendant's right under the Sixth Amendment to present an adequate defense; the limitations on "prosecutorial discretion" impliedly embodied in the equal protection clause of the Fourteenth Amendment; and the circumstances in which the threat of "irreparable harm" associated with grievable state action is so great that a court of equity should grant preliminary injunctive relief. We need not – and indeed may not – reach those questions, however, having concluded that, in the unique circumstances present here, the district court should have abstained from decision of the case and dismissed the plaintiffs' action.

In our view, this case invokes the principle counseling abstention that was announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Giving force to the "longstanding public policy against [equitable] interference with state court proceedings," *id.* at 43, 91 S.Ct. at 750, *Younger* held that federal courts may not enjoin a pending state criminal prosecution, absent a clear showing that "defense of the . . . prosecution will not assure adequate vindication of constitutional rights." *Id.* at 48-49, 91 S.Ct. at 753 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 485, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965)). What lies behind *Younger*, of course, is a broader rule of comity: namely, that federal courts should abstain from the decision of constitutional challenges to state action, however meritorious the complaint may be, "whenever [the] federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-38, 104 S.Ct. 2321, 2328, 81 L.Ed.2d 186 (1984). *Younger* thus implements the broader

notion that ours "is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44, 91 S.Ct. at 750.

The preliminary injunction challenged here works the sort of practical interference with an ongoing state criminal proceeding that *Younger* counsels against. We recognize, of course, that the district court's order does not by its terms enjoin or otherwise directly interfere with the pending state prosecution. Its direct effect was only to enjoin the future prosecution of persons engaged in the procurement of evidence intended for use in that prosecution. But while in terms the injunction as sought and granted protected only the asserted sixth amendment right to the state defendants in that proceeding to obtain the evidence, necessarily implicit in any such decree must be a judicial perception that the reason its procurement is constitutionally protected is because, more fundamentally, its use is. While we can point to no direct authority on the point, we cannot see how there could be any constitutionally protected right to obtain evidence for use in a pending state proceeding unless its use for that purpose were also thought to be constitutionally protected. Equity is no more properly invoked and exercised for vain, or potentially vain, endeavors in constitutional than other matters, and we cannot conceive that the injunction sought and granted here was granted on any assumption that the constitutional right that protected

procurement of the evidence ended once the evidence was in hand. That being so, implicit in the injunctive decree was an apparent anticipatory federal ruling that if offered in the pending state proceeding, this obviously critical evidence enjoyed some measure of constitutional protection. At the very least, its practical effect was to raise the specter of a federal pre-judgment that the evidence enjoyed some measure of federal constitutional protection that must be taken into account by any state court ruling on its admissibility under state rules of evidence. In these circumstances, where the question of the federal plaintiffs' entitlement to "future injunctive . . . relief [was] unavoidably . . . decided against the backdrop of pending state proceedings," *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir.1988), the result was an injunctive decree that necessarily embodied "an ongoing federal audit of state criminal proceedings [that] indirectly accomplish[ed] the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent." *O'Shea v. Littleton*, 414 U.S. 488, 500, 94 S.Ct. 669, 678, 38 L.Ed.2d 674 (1974).

It is no barrier to *Younger* abstention here that the injunction in terms protects individuals who are not parties to the pending state prosecution. The express purpose of the injunction was to vindicate the rights of parties, the federal plaintiffs, who were. This case is not therefore like those where an individual who is not a party to ongoing state proceedings has been held entitled, over abstention objections, to federal injunctive relief against future enforcement of state laws. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975); *District Property Associates v. District of*

Columbia, 743 F.2d 21, 28 (D.C.Cir.1984); *Kennecott Corp. v. Smith*, 637 F.2d 181, 185-86 (3d Cir.1980). In the instant case, unlike those where federal injunctive relief is being sought in behalf of persons not parties to ongoing or pending state proceedings, these federal plaintiffs are in a position to raise the constitutional claims that they seek to vindicate in this action by federal injunction as defenses in the pending state proceeding.

Disputing this point, the federal plaintiffs contend that they cannot be assured, of adequate vindication of their constitutional rights in the state proceeding and that this makes abstention improper. Such assurance is indeed properly a condition to *Younger* abstention, *see Dombrowski v. Pfister*, 380 U.S. 479, 485, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965), but it is inapplicable here. Cinema Blue's specific contention is that the North Carolina state court in which their prosecution was pending lacked any "inherent power" to grant the sort of protective order needed to secure their sixth amendment right; that therefore they cannot vindicate that right in the pending state proceeding. No authority under state law is cited to us for this proposition, and we are inclined on general principles to doubt it. But we think it irrelevant in any event whether any such inherent power has to this date been affirmatively recognized and exercised by the North Carolina courts. If there is indeed a sixth amendment right to gather this sort of evidence (and presumably then to use it) in defense of state obscenity prosecutions, any denial of that right, whether at the protective order stage or at the evidentiary stage, is obviously subject to challenge in the state courts by some appropriate device, and any adverse ruling on such a challenge is as obviously subject

to preservation for direct constitutional review. In this, as in such matters generally, we indulge the assumption that the state courts are willing and able to vindicate federal constitutional rights. The abstention condition is merely that there be a pending state proceeding in which an opportunity to raise the constitutional challenge will be available to the federal plaintiff. *Suggs v. Brannon*, 804 F.2d 274, 279 (4th Cir.1986). Though we may not be sure exactly what procedural mechanism for doing so will be most appropriate, it is not necessary that we be. It suffices to be confident that it can be raised in some appropriate way, and that we are.

Finally, none of the recognized exceptions to *Younger* abstention is even colorably present here.

There is no claim that any prosecutions of Cinema Blue's expert witnesses would be undertaken in bad faith – that is, "without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6, 95 S.Ct. 1524, 1531 n. 6, 44 L.Ed.2d 15 (1975). Cinema Blue's suggestion that any such prosecution undertaken would be "selective," in view of failures of the state to have prosecuted others engaged in similar disseminations of the material in issue is utterly speculative.

Neither could there be any claim by Cinema Blue that federal injunctive relief was required to protect its putative witness against "great and immediate" danger at the state's hands. A federal court may indeed enjoin the threatened state prosecution of one not then a party to ongoing state proceedings, but it need not, and should not do so, "except under extraordinary circumstances," *Fenner v. Boykin*, 271 U.S. 240, 243, 46 S.Ct. 492, 493, 70

L.Ed. 927 (1926). This may include a threat of great and immediate harm irremediable except by injunction, *see Younger*, 401 U.S. at 46, 91 S.Ct. at 751, but no such extraordinary circumstances are presented here for Cinema Blue's witness (assuming Cinema Blue had standing to claim federal protection for him in vindication of his own rights). Whether this witness faced any threat of state prosecution was entirely a matter of his own choice. He was not immediately threatened with any irremediable harm, for his remedy for avoiding state prosecution lay entirely within his hands and could be invoked with no sacrifice of any federal rights personal to him.

III

Because the requested federal injunction threatened significant interference with a pending state proceeding in which the federal plaintiffs would have adequate opportunity to vindicate the constitutional right asserted as a basis for injunctive relief, and because there are no countervailing justifications for such interference, the district court erred by not abstaining from entertaining this action. Accordingly, we reverse and vacate its decree.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-1415

CINEMA BLUE OF CHARLOTTE, INCORPORATED; JIM ST. JOHN; CURTIS RENE PETERSON

Plaintiffs – Appellees

v.

PETER S. GILCHRIST, III

Defendant – Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc
(Filed Oct. 30, 1989)

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Murnghan and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX E

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-88-557-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON, Plaintiffs, -vs- PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity, Defendant.	*ORDER* (Filed Dec. 7, 1989)

Pursuant to the mandate issued by the Fourth Circuit Court of Appeals on October 5, 1989, the plaintiffs' claims for injunctive and declaratory relief are DISMISSED.

This 7 day of December, 1989.

/s/ James B. McMillan
James B. McMillan
United States District Judge

APPENDIX F

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law. . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT V

No person shall . . . . be deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Ch. 21 CIVIL RIGHTS 42 § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NORTH CAROLINA GENERAL STATUTES
(ABBREVIATED N.C.G.S.)

§ 14-190.1. Obscene literature and exhibitions.

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class J felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband. (1971, c. 405, s. 1; 1973, c. 1434, s. 1; 1985, c. 703, s. 1.)

N.C.G.S. 15A-1442

The following constitutes grounds for correction of errors by the appellate division.

***

(4) Errors in Procedure –

A. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.

***

N.C.G.S. 15A-1443

(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.

***

APPENDIX G

MOTION FOR PROTECTIVE ORDER – 88CRS46915, 88CRS4909 & 46920, 88CRS46902, 88CRS65318, 65319, 65320, 65321, 65322, 65323, 65324, 65325, 88CRS62471, 62472, 62474, 62475, 62476, 62477, 62478, 69839, 69840, 69844, 69846, 69849, 69853, 88CRS46966, 46970, 46973, 46976, 46979, 46983, 49698, 49859, (Filed December 20, 1988

STATE OF NORTH CAROLINA)
v)
Terry Darlene Treadwell)

STATE OF NORTH CAROLINA)
v)
SHERRIE LYNN TREADWELL,)

STATE OF NORTH CAROLINA)
v)
RODNEY SHERWOOD BEATTY)

STATE OF NORTH CAROLINA)
v)
JIM ST. JOHN)

STATE OF NORTH CAROLINA)
v)
CURTIS RENE PETERSON)

STATE OF NORTH CAROLINA)
v)
CINEMA BLUE OF CHARLOTTE,)
INC., a North Carolina corporation,)
a/k/a CINEMA BLUE ADULT)
ENTERTAINMENT CENTER a/k/a)
CINEMA BLUE OF CHARLOTTE,)
a/k/a CINEMA BLUE)

NOW COME Defendants and respectfully show:

1. In preparation for the trial of these actions, Defendants wish to prepare expert testimony. In particular Defendants propose to develop expert testimony which requires that their experts be at liberty to present for viewing, by randomly selected audiences, the material which the indictments in these cases charge to be obscene. Defendants have engaged Dr. Joe Scott, a Professor of Sociology at Ohio State University, who has considerable experience and expertise in the fields of sociology, sexology, criminology and statistical methodology, as one of their experts in these cases. Dr. Scott has published articles in these areas and testified as an expert in these areas. The Court accepted Dr. Scott as an expert in these areas for purposes of his testimony at the December 5, 1988, hearing on this matter. Dr. Scott proposes to develop testimony on the issues, among others, of:

> (a) Whether the material at issue depicts or described sexual conduct "in a patently offensive way", within the meaning of N.C.G.S. 14-90.1(b)(1);
>
> (b) Whether the average person, applying contemporary community standards relating to the depiction or description of sexual matters, would find that the material at issue, taken as a whole, appeals to the prurient interest in sex, within the meaning of N.C.G.S. 14-190.1(b)(2); and
>
> (c) Whether the material at issue lacks serious literary, artistic, political, or scientific value, within the meaning of N.C.G.S. 14-90.1(b)(3).

2. Dr. Scott proposed to develop this testimony by presenting certain questions, and the material at issue, to

randomly selected groups of Mecklenburg County adults, for two main purposes.

3. First, in *State v. Anderson*, 322 N.C. 22 (1988), *cert. den.* ___ U.S.L.W. ___ (12-1-88), the Supreme Court of North Carolina held that certain questions used by the expert in that obscenity prosecution were not relevant to the issue of obscenity in that case because, in substance, the questions did not specifically enough identify the type of material to which the questions related. Dr. Scott proposes to conduct a telephone survey in Mecklenburg County, relating to this community's acceptance of the depiction or description of sexual conduct. After *State v. Anderson*, in order to conduct a valid survey, Dr. Scott must use language which is competent to specifically denote that he is asking about "sexual conduct" within the meaning of N.C.G.S. 13-190.1(c). He proposes to use the established sociological technique of "focus groups" to validate the language to be used in his telephone survey. He prposes [sic] to do this by presenting an initial questionnaire to the focus group participants, in which he asks them their attitudes about the depiction or description of "sexual conduct" variously described. He then proposes to show them one or more of the items at issues in these prosecutions. He will then ask them if the materials they have viewed were what they expected to view, under one more of his linguistic formulations of "sexual conduct". He will then apply recognized sociological and statistical techniques to the results of these questionnaires, to determine whether he has validated language appropriate to the level of specificity required by *State v Anderson, supra.*

4. A second purpose of these "focus groups" will be to assess the attitudes of the focus group members themselves to the items which are the subject of the indictments, and to extrapolate from these findings, using recognized sociological and statistical techniques, to a conclusion of whether these particular materials depict or describe sexual conduct in a patently offensive way and whether the average person applying contemporary community standards relating to the depiction or description of sexual matters would find these materials, taken as a whole, appeal to the prurient interest in sex, and whether these materials lack serious literary, artistic, political or scientific value.

5. The District Attorney for the State has stated to the Defendants, and to the Court at the December 5, 1988, hearing, that if Dr. Scott conducts "focus groups" in Mecklenburg County by exhibiting any of the materials at issue, the District Attorney will prosecute Dr. Scott for dissemination of obscenity.

6. None of the materials at issue in any of the these prosecutions have been adjudged obscene in this case, or in any other action of which counsel of Defendants are advised.

7. Dr. Scott has stated to the Court that he refuses to proceed with the contemplated development of expert testimony, in view of the threat of prosecution.

8. Defendants are now substantially deterred from:

(a) Proceeding with the contemplated development of testimony by Dr. Scott;

(b) Engaging local sex therapists to use the materials which are the subject of these prosecutions in their sex therapy practices, with a view toward testifying that these materials have substantial scientific value;

(c) Exhibiting the materials at issue to potential expert witnesses;

(d) Exhibiting the materials at issue to themselves in company with each other, in preparation for trial; or

(e) Exhibiting the materials at issue to a mock jury, in preparation for trial.

WHEREFORE, Defendants respectfully move that this Honorable Court issue its Protective Order, allowing them to exhibit the materials at issue in these prosecutions within Mecklenburg County:

(a) to "focus groups" to be convened by Dr. Scott or his designee;

(b) to sex therapists;

(c) to potential expert witnesses;

(d) to themselves in company with each other; and

(e) to a mock jury in preparation for trial.

Respectfully submitted, this 20 days of December, 1988.

NELSON M. CASSTEVENS, JR.
HAROLD H. BENDER

JAMES F. WAYTT, III
EBEN T. RAWLS
GEORGE DALY
CALVIN E. MURPHY

BY: s/ George Daly

APPENDIX H

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

STATE OF NORTH CAROLINA v. CINEMA BLUE OF CHARLOTTE, INC., a North Carolina corporation, a/k/a CINEMA BLUE ADULT ENTERTAINMENT CENTER, a/k/a CINEMA BLUE OF CHARLOTTE, a/k/a CINEMA BLUE	88-CRS-46966, 46970, 46973, 46976, 46979, 46983, 49698, 69859
STATE OF NORTH CAROLINA v. CURTIS RENE PETERSON	88-CRS-62471, 62472, 62474, 62475, 62476, 62477, 62478, 69839, 69840, 69844, 69846, 69849, 69853
STATE OF NORTH CAROLINA v. JIM ST. JOHN	88-CRS-65318, 65319, 65320, 65321, 65322, 65323, 65324, 65325

ORDER DENYING REQUEST FOR PROTECTIVE ORDER

(Filed Dec. 30, 1988)

THIS MATTER was heard by the Court on December 5, 1988. At that time, Defendants made an oral motion for Protective Order requesting that this Court enter an order

enjoining the Mecklenburg County Prosecutors Office from enforcing the North Carolina Obscenity Statute (G.S. 14.190.1 et. seq.) in connection with the use of the particular video cassette motion picture films and magazine which are the subject matter and form the basis of the instant obscenity prosecutions by social scientists for purposes of presenting evidence on the issue of "obscenity". In furtherance of Defendants' oral motion, testimony was taken from Dr. Joseph Scott, Ohio State University. For purposes of this motion only, this Court accepted Dr. Scott as an expert witness in the areas of Sociology, Criminology, Sexology and Statistical Methodology. Dr. Scott testified that he, together with other Sociologists, intended to conduct what he referred to as "focus group" studies, an accepted sociological method for determining attitudes of population groups. Dr. Scott further testified that the showing of the films and magazine was an integral part of the conducting of the study and that the study was an integral part of the research necessary for him to reach conclusions and give his opinion of whether the material appeals to a prurient interest, whether it is patently offensive and whether it lacks serious literary political, artistic or scientific value.

Defense counsel advised this Court that it had inquired of the Mecklenburg County Prosecutors Office as to whether or not the conducting of such a study would subject those who were involved therein to potential prosecution in Mecklenburg County for violation of G.S. 14.190.1 et. seq.. Defense counsel advised that the response from the Mecklenburg County Prosecutors Office was affirmative and to the effect that such conduct,

if occurring in Mecklenburg County, would, indeed, subject the participants therein to potential prosecution. This fact was confirmed by Peter Gilchrist, Esq., Mecklenburg County Prosecutor.

Defense counsel has subsequently filed a written motion for Protective Order in furtherance of its oral motion made on December 5, 1988. On December 5, 1988, this Court, from the bench, orally denied Defendants' motion. This Court now enters this Order in furtherance of said pronouncement.

Having considered the motion of Defendants for Protective Order, the oral arguments, testimony and legal memorandum in support thereof, this Court now rules as follows:

The Defendants' Motion for Protective Order seeking injunctive relief to prevent enforcement of the North Carolina Obscenity Statutes in connection with the use of the video cassette motion picture films and magazine that are the subject matter of the instant criminal actions by sociologists be, and the same is hereby denied.

/s/ Marvin K. Gray
12-17-88

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-88-558-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON, Plaintiffs, vs. PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity, Defendant.	*COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION* (Filed Dec. 23, 1988)

PLAINTIFFS, complaining of Defendant, say:

1. This court is granted jurisdiction of this action by 28 U.S.C. 1343.

2. This is an action pursuant to 42 U.S.C. 1983.

3. Plaintiff Cinema Blue of Charlotte, Inc. is a North Carolina corporation and has the capacity to sue in its own name. Defendants Jim St. John and Curtis Rene Peterson are citizens and residents of Michigan.

4. Defendant Peter S. Gilchrist III is the duly elected and presently empowered District Attorney for the Twenty-Sixth Prosecutorial District (which is Mecklenburg County, North Carolina). He is the prosecuting officer for all crimes committed in this District. He is sued in his official capacity, and as the official representative of

all persons authorized by law to effect arrests or prosecute for crime in Mecklenburg County, North Carolina.

5. Plaintiffs in this action are presently Defendants in various felony criminal actions pending in the Superior Court of Mecklenburg County, North Carolina. Each Defendant is charged with several counts of disseminating obscenity, in violation of N.C.G.S. 14-190.1, the North Carolina Obscenity Law, and with conspiring to disseminate obscenity. A fuller statement of these charges is attached as Exhibit A.

6. The North Carolina Obscenity Law defines material to be obscene if, among other things:

> "1. The material depicts or describes in a patently offensive way sexual conduct specifically defined by sub-section (c) of this section; and
>
> 2. The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appears to the prurient interest in sex; and
>
> 3. The material lacks serious literary, artistic, political, or scientific value." N.C.G.S. 14-190-.1(b)(1), (2), (3).

7. Plaintiffs are scheduled to be tried in the obscenity prosecutions commencing February 13, 1989. They wise to defend at trial by offering expert testimony that the videotapes and magazines at issue are not obscene. Plaintiffs propose to develop expert testimony which requires that their experts be at liberty to present for viewing, by randomly selected Mecklenburg County audiences, the material which the indictments charge to

be obscene. Defendants have engaged Dr. Joe Scott, Professor of Sociology at Ohio State University, who has considerable experience and expertise in the fields of sociology, sexology, criminology and statistics, as one of their experts in these cases. Dr. Scott proposes to develop testimony on whether the material at issue is within the definitions stated in N.C.G.S. 14-190.1(b)(1), (2), and (3). Dr. Scott proposes to develop this testimony by two principal methods. First, he proposes to present some or all of the materials at issue to "focus groups," randomly selected groups of Mecklenburg County adults. He will assess the attitudes of the focus group members toward the items at issue, and then extrapolate from these findings, using recognized sociological and statistical techniques, to a conclusion of whether these particular materials are within the definitions stated in N.C.G.S. 14-190.1(b)(1), (2), and (3). Also, Dr. Scott proposes to use the "focus groups" to validate certain language which he then proposes to use in conducting telephone surveys of community attitudes. In *State v. Anderson*, 322 N.C. 22 (1988), *cert. den.* 57 U.S.L.W. ___ (12-1-88), the Supreme Court of North Carolina held that certain questions used by the expert in that obscenity prosecution were not relevant to the issue of obscenity in that case because, in substance, the questions did not specifically enough identify the type of material to which the questions related. Dr. Scott proposes to conduct a telephone survey in Mecklenburg County concerning this county's acceptance of the depiction or description of "sexual conduct" within the meaning of N.C.G.S. 14-190.1(b)(1). After *State v. Anderson*, in order to conduct a valid survey Dr. Scott must use language which is competent to specifically

denote that he is talking about "sexual conduct" as defined by N.C.G.S. 14.190.1(c).[1] He proposes to do this by presenting a questionnaire to the focus group participants, before they have viewed the material in question, in which he asks them their attitudes about the depiction or description of "sexual conduct," described in words. He then proposes to show them one or more of the items at issue in the state court prosecutions. He will then ask them if the materials they have viewed were what they expected to view, under one or more of his linguistic formulations of "sexual conduct." He will then apply recognized sociological and statistical techniques to the answers to these questions, to determine whether he has validated language appropriate to the level of specificity required by *State v. Anderson*.

8. Defendant has stated to Plaintiffs that if Dr. Scott conducts "focus groups" in Mecklenburg County, or otherwise exhibits any of the materials at issue in the criminal prosecutions, he will prosecute Dr. Scott for dissemination of obscenity.

---

[1] N.C.G.S. 14-190.1 Obscene Literature and Exhibitions. (c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume."

9. None of the material at issue in any of the prosecutions have been judged obscene in those prosecutions, or in any other action of which Plaintiffs are advised.

10. Dr. Scott has refused to proceed with the contemplated development of expert testimony, in view of Defendant's threat to prosecute him.

11. Defendants are now substantially deterred from:

(a) proceeding with the contemplated development of testimony by Dr. Scott;

(b) engaging local sex therapists to use the materials at issue in their sex therapy practices, with a view toward testifying that these materials have substantial scientific value;

(c) exhibiting the materials at issue to other expert witnesses; and

(d) exhibiting the materials at issue to a mock jury, in preparation for trial.

12. Upon information and belief, Defendant Gilchrist has failed to prosecute other similarly situated who publicly disseminated materials which were substantially equivalent, in content and character, to the items at issue in the pending prosecutions of Plaintiffs. Plaintiffs are informed and believe that the Concerned Charlotteans, a fundamentalist religion group, and the University of North Carolina at Charlotte Department of Justice in conjunction with the Federal Bureau of Investigation, have each conducted public exhibitions of such materials in Mecklenburg County, to the knowledge of Defendant Gilchrist or his agents and without interference by them. Plaintiffs believe that these public exhibitions occurred in about 1985, in connection with political efforts, ultimately

successful, to amend the North Carolina Obscenity Law to remove from it the former adversary hearing requirement. *See* N.C.G.S. 14-190.2 (1979 Cum.Supp.), *repealed*, Session Laws 1985, c.703 s.2, effective October 1, 1985.

13. Plaintiffs claim that Defendant Gilchrist has, by his conduct, deprived them of:

(a) Their Sixth and Fourteenth Amendment right to present testimony;

(b) Their First Amendment right to freedom of speech and to be free from prior restraints thereof; and

(c) Their Fourteenth Amendment right to the equal protection of the laws.

14. Plaintiffs have no plain, adequate, or complete remedy at law, other than this suit for declaratory and injunctive relief. Plaintiffs are suffering irreparable harm, and will continue to so suffer until Defendant is enjoined as prayed. Unless Plaintiffs can obtain the evidence at issue prior to their forthcoming trial in Mecklenburg County Superior Court, the community attitudes which are at issue will have so significantly changed that they will be beyond recapture.

WHEREFORE, Plaintiffs respectfully pray:

1. That the Court, upon final trial, declare illegal the conduct of Defendant Gilchrist;

2. That, pending final trial and determination, the Court preliminarily enjoin Defendant Gilchrist, and those whom he represents, from arresting or prosecuting Plaintiffs or their experts or their counsel, for disseminating any of the items listed on Exhibit A, for the purposes of:

(a) conducting "focus groups" using the materials listed on Exhibit A to sample community attitudes about the matters put in issue by N.C.G.S. 14-190.1(a), (b), and (c), and determining the validity of language proposed to be used in telephone surveys;

(b) engaging local sex therapists to use the materials at issue in their sex therapy practices, with a view toward testifying that these materials have substantial scientific value;

(c) exhibiting the materials at issue to other expert witnesses; and

(d) exhibiting the materials at issue to a mock jury, in preparation for trial.

3. Award Plaintiffs their costs, their reasonable counsel fees, and such other and further relief as is merited in the premises.

Respectfully submitted, this 22nd day of December, 1988.

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(704) 372-2140

Lee J. Klein
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Attorneys for Defendant
Cinema Blue of Charlotte, Inc.

By: /s/ Nelson Casstevens

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By: /s/ George Daly

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(704) 376-7461

By: /s/ Calvin Murphy

Attorney for Defendant
Curtis Rene Peterson

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-88-557-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON, Plaintiffs, vs. PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity, Defendant.	*FIRST AMENDED COMPLAINT*

NOW COME Plaintiffs and, Defendant not having answered, amend their Complaint and allege and say:

1. The Honorable Marvin K. Gray, Superior Court Judge, has been assigned to preside over the state court felony trials of Plaintiffs. On December 5, 1988, he heard the parties in argument on all pending motions. Immediately before argument Plaintiffs told Defendant Gilchrist of their plans to develop expert testimony by exhibiting the materials at issue to "focus groups" conducted by Dr. Joe Scott. Defendant Gilchrist replied that if Dr. Scott exhibited the materials at issue to "focus groups" in Mecklenburg County, he would prosecute Dr. Scott for dissemination of obscenity. Plaintiffs then moved orally at the ensuing argument before Judge Gray for a protective order against the arrest of Dr. Scott if he

exhibited the materials. The Court denied this motion. Plaintiffs have since, by leave of Court, made their motion in written form. A copy is attached as Exhibit A. The Court denied this motion on December 30, 1988. A copy of this ruling is attached as Exhibit B.

2. All prior allegations are re-alleged.

WHEREFORE, Plaintiffs pray as previously.

Respectfully submitted, this 31st day of December, 1988.

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Attorney for Defendant
Curtis Rene Peterson

By: /s/ George Daly
George Daly

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-88-557-M

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, and CURTIS RENE PETERSON, Plaintiffs,	)	*AFFIDAVIT OF DR. JOSEPH E. SCOTT*
vs.	)	
PETER S. GILCHRIST, III, District Attorney of the Twenty-Sixth Prosecutorial District, in his official capacity, Defendant.	)	(Filed Jan. 10, 1989)

Dr. Joseph E. Scott, being first duly sworn, deposes and says:

1. My name is Joseph E. Scott. I am an Associate Professor of Sociology at Ohio State University. My address is 190 North Oval Mall, Ohio State University, Columbus, Ohio 43210. I have a Bachelor's degree from the University of Utah, and a Master's degree and a Ph.D. in Sociology from Indiana University. I received my Doctorate in 1972. I have published in the fields of sociology, criminology, statistics and sexual behavior. I have testified as an expert on these subject matters in numerous courts. A copy of my current vita is attached.

2. I have been engaged by Plaintiffs to conduct research as an expert for them in cases currently pending against them in Mecklenburg County Superior Court, and

to develop information on which to base my possible testimony.

3. I am unable to attend the hearing in this court on January 9, 1989, because of prior academic commitments.

4. I propose to conduct research for Plaintiffs on the issues, among others, of:

(a) Whether the material at issue depicts or describes sexual conduct "in a patently offensive way," within the meaning of N.C.G.S. 14-190.1(b)(1);

(b) Whether the average person, applying contemporary community standards relating to the depiction or description of sexual matters, would find that the material at issue, taken as a whole, appeals to the prurient interest in sex, within the meaning of N.C.G.S. 14-190.1(b)(2); and

(c) Whether the material at issue lacks serious literary, artistic, political or scientific value, within the meaning of N.C.G.S. 14-190.1(b)(3).

5. I propose to conduct this research by presenting certain questions, and the sexually explicit material which Plaintiffs are charged with disseminating, to randomly selected groups of Mecklenburg County adults, for two main purposes.

6. First, in *State v. Anderson*, 322 N.C. 22 (1988), *cert. den.* ___ U.S.L.W. ___ (12-1-88), the Supreme Court of North Carolina held that certain questions used by social scientists in a telephone survey of community attitudes about sexually explicit material were not relevant to the issue of obscenity because, in substance, the questions did not specifically enough identify the type of material

to which the questions related. In connection with my services for Plaintiffs, I propose to conduct a telephone survey in Mecklenburg County, relating to this community's acceptance or non-acceptance of the depiction or description of sexual conduct and other issues posed by the North Carolina Obscenity Statute. After *State v. Anderson*, in order for a survey's results to be admitted in evidence at an obscenity trial, it must use language which specifically describes the nature and content of the sexual activities displayed in the material at issue. I propose to deal with this problem by using the established scientific technique of "focus groups" to validate the language used in the telephone survey. I propose to do this by presenting an initial questionnaire to the focus group participants, in which I ask them their attitudes about the depiction or description of sexual conduct, variously described. I then propose to show them one or more of the items at issue in the pending prosecutions. I will then ask them if the materials they viewed were what they expected to view, under one or more of my linguistic formulations of sexual conduct. I will then apply recognized statistical techniques to the answers to these questions, to determine whether I have validated language at the level of specificity required by *State v. Anderson*.

7. A second purpose of these focus groups will be to assess the attitudes of the focus group members themselves to the materials which are the subject of the indictments, and to extrapolate from these findings, using recognized social science and statistical techniques, to reach conclusions of (a) whether these particular materials depict or describe sexual conduct in a patently offensive way, (b) whether the average person, applying

contemporary community standards relating to the depiction or description of sexual matters, would find that these materials, taken as a whole, appeal to the prurient interest in sex, and (c) whether these materials lack serious literary, artistic, political or scientific value.

8. I propose to conduct this research in conjunction with other social scientists and professional service companies, under my direction and control.

9. I am informed by counsel for Plaintiffs that the District Attorney for Mecklenburg County, Defendant Peter S. Gilchrist, III, has stated that if I proceed as stated above, I will be subject to prosecution for dissemination of obscenity. I have accordingly declined to proceed with my contemplated research, and will not agree to proceed with it unless I am assured that my participants and associates and I will be well protected against prosecution.

10. In my view the exhibition of the very materials at issue to the focus groups is the best and most appropriate way to accomplish my purposes of validating language appropriate to the level of specificity required by *State v. Anderson*, and sampling the attitudes of the focus group members which bear on the questions posed by the North Carolina statute.

11. I am informed that the pending criminal charges allege dissemination of obscenity from October, 1985 to June, 1988. It is presently difficult to determine or assess community standards as to the acceptability or unacceptability of sexually explicit material for the average adult resident of Mecklenburg County for October, 1985. In my view it would be considerably more difficult, if not

impossible, to accurately measure or ascertain these standards a year or more from now, which I am informed by counsel is the approximate least time that state appellate review of this matter could be obtained. In my view, unless I can proceed shortly, the information which I need to gather will be most difficult, if not impossible, to accurately obtain.

Further, affiant sayth not.

Respectfully submitted, this the 6th day of January, 1989.

/s/ Dr. Joseph E. Scott
Dr. Joseph E. Scott

APPENDIX L

December 6, 1989

Peter Gilchrist III
District Attorney
700 East Trade Street
Charlotte, North Carolina 28202

RE: Cinema Blue of Charlotte Inc. vs. Gilchrist

Dear Mr. Gilchrist:

As you are aware, the 4th Circuit United States Court of Appeals has reversed Judge McMillan's injunction that allowed the defendants to perform the expert witness studies, based on the 4th Circuit's belief that Judge McMillan should have abstained in this action. As I am sure that you can appreciate, the plaintiff's to this action and the expert witnesses employed in the film evaluation study are now concerned as to your intentions as to whether or not to prosecute these individuals (and the corporate defendant Cinema Blue). This concern is all the more acute due to my unquestioned belief that there will be a retrial in the state court action.

I am, therefore, writing you this letter in an attempt to obtain verification from you that neither you, the Police Department of North Carolina nor the City of Charlotte, North Carolina will attempt to arrest and/or charge, and/or prosecute either Cinema Blue of Charlotte, Inc., Curtis Peterson, Jim St. John, any of their attorneys or any of the expert witnesses or their agents, employees or assistants who participated in the film evaluation study during January of this year for use as part of the defense in the *State of North Carolina vs. Cinema Blue of Charlotte, et al.*, based upon any claim of a penal violation of the North Carolina obscenity statutes with regard to

the conducting of the film evaluation study or the accumulation and presentation at Court of various "comparable" materials.

If I do not receive written verification from you that there will be no arrests, charges or prosecutions regarding the conducting of the film evaluation study and accumulation and presentment of "comparable" materials within seven days from the date of this letter, I will assume that you are unwilling to provide this verification, that those individuals (and Cinema Blue of Charlotte, Inc.) as set forth above are still in reasonable apprehension of threatened prosecution from your office, and I will therefore take the necessary steps to petition the United States Supreme Court for Certiorari to review this matter.

Please note that my request for verification includes only those individuals connected with the defense of the *State of North Carolina vs. Cinema Blue of Charlotte, Inc., et al.* matter, and is limited to the circumstances arising from the defense of that action. I am in no way requesting any form of verification that you will not prosecute any individuals or entities regarding any other matters. However, my request for verification does, in fact, seek to confirm that, if the State Court matter is retried, that there will be no arrests, charges or prosecutions with regard to any of the studies or defenses that have been previously proffered, and which will again be proffered at retrial. I await your response.

Sincerely,
KLEIN & SHAFER, P.C.

By:/s/ Lee J. Klein

LJK/cn

APPENDIX M

STATEMENT OF PURPOSE

Appellees state that in legal counsels judgment, the Court overlooked material factual and legal matters in its decision, and in support thereof, respectfully show:

1. The Court *overlooked, and did not address* the impact of the fact that, as determined by the District Court, " . . . with each passing day, measurement of the 'contemporary community standards' which existed- . . . when plaintiff's disseminated the materials at issue, becomes more difficult."[2] The foregoing conclusion, as determined by the District Court supported its determination of the existence of 'irreparable injury' thus removing application of *Younger* abstention doctrines.

---

[2] *Cinema Blue of Charlotte, Inc. v Gilchrist*, No. C-C-88-557-M, slip op. at 11-12 (W.D.N.C. January 13, 1989.)

(2)

No. 89-1213

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

CINEMA BLUE OF CHARLOTTE, INC.,
JIM ST. JOHN, CURTIS RENEE PETERSON,

Petitioners,

vs.

PETER S. GILCHRIST III, DISTRICT
ATTORNEY OF THE 26TH PROSECUTORIAL
DISTRICT, IN HIS OFFICIAL CAPACITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

LACY H. THORNBURG
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Jean A. Benoy
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No. 89-1213

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

CINEMA BLUE OF CHARLOTTE, INC., JIM ST. JOHN, CURTIS RENE PETERSON, Petitioners,

vs.

PETER S. GILCHRIST III, DISTRICT ATTORNEY OF THE 26TH PROSECUTORIAL DISTRICT, IN HIS OFFICIAL CAPACITY, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On December 5, 1989, prior to arguments on pre-trial motions in the criminal obscenity prosecution of Petitioners in North Carolina Superior Court, Petitioners' (hereafter Cinema Blue) first approached and requested Respondent (hereafter Gilchrist) either to assure them that their proposed expert would not be prosecuted if he exhibited charged materials to large "focus groups" of local citizens or to grant immunity from prosecution. Gilchrist did neither.

At no time did Gilchrist "threaten" prosecution, despite Cinema Blue's repeated assertions that the prosecutor's refusal to offer premature assurances of non-prosecution constituted "threats." Instead, Gilchrist merely refused to guarantee to forbear prosecution and suggested that Cinema Blue take their request to the trial court.

Cinema Blue then moved the Superior Court of North Carolina in Mecklenburg County, Judge Marvin Gray, presiding, for a protective order to prevent the experts' prosecution in the event they

conducted large "focus group" exhibitions and the twelve indicted materials were determined to be obscene. Gilchrist then expressed his opinion in state court that, based upon the postulate before the court of mass public exhibitions of the twelve indicted materials, that such exhibitions would contravene the North Carolina obscene exhibitions law (N.C.G.S. 14-190.1). In fact, the twelve items included five materials previously adjudicated to be obscene. Cinema Blue's request was denied by Judge Gray after a full hearing.

At the hearing before Judge Gray, Gilchrist told the state court that he would not object to providing the materials to Cinema Blue's expert witnesses for their private use in preparing expert testimony. (4th Cir. J.A. 25-a) Nevertheless, after denial of the protective order by the state court, Cinema Blue requested the Federal District Court to enter a preliminary injunction against any State official from interfering with the showing of the indicted items by Cinema Blue or its primary expert, one Dr. Scott.

Federal District Judge James B. McMillan scheduled a hearing on Cinema Blue's motion and Gilchrist was called by Cinema Blue to testify. Judge McMillan asked Gilchrist if Cinema Blue's apprehensions about being prosecuted should Dr. Scott show the twelve pleaded materials were reasonable and Gilchrist testified that they were. After Gilchrist left the witness stand, Cinema Blue admitted that five of the twelve materials were obscene and deleted them from their federal complaint. (4th Cir. J.A. 75-a) The abbreviated list was never presented to state court or Gilchrist.

Cinema Blue did not present any evidence to the Court that showed any prosecutorial bad faith or invidious patterns of discriminatory enforcement. Evidence indicated that an unprosecuted showing of some explicit sexual material (none of which were identical to the items charged against Cinema Blue) occurred in the Criminal Justice curriculum at the University of North Carolina at Charlotte prior to the effective date of the new, strengthened North Carolina obscenity law in October, 1985. Yet, evidence indicated that most, if not all, such material was not as explicit as the items involved in this case. (4th Cir. J.A. 97-99a) There was no evidence of any complaints to Gilchrist nor any evidence that the material violated the law as it then existed.

There was also evidence of another unprosecuted showing of even less explicit material to a civic group opposed to obscenity that occurred after the passage of the new law. Yet, the testimony of Cinema Blue's witnesses indicated that no known complaints were

made and, since it simply consisted of nude photographs, the material was probably not obscene under the new law. (4th Cir. J.A. 66-a and 69-a) Judge McMillan nevertheless entered his Order granting the preliminary injunction.

Despite the fact that Mr. Gilchrist's above-noted statement concerning the lawfulness of providing the materials to the expert for their use in preparing testimony was pointed out to Judge McMillan, the Judge nevertheless held in his Order that "(w)ithout the injunction, plaintiffs will stand trial in state court without being able to offer expert testimony in their defense." (Pet. App. 8) This clear error, among others, was pointed out by Gilchrist to the Fourth Circuit, which reversed the District Court and ordered it to abstain.

The Opinion of the Fourth Circuit (Pet. App. 17) notes that this "dispute is essentially one over the way in which the appellees (Cinema Blue) intended to lay the foundation for the expert's testimony." Cinema Blue (Pet. 4-5) maintains that the methodology chosen resulted from "concern as to admissibility of (public opinion surveys) . . . due to a recent line of appellate decisions calling into question, and, in fact, disapproving of certain definitions and descriptions [of allegedly obscene materials] used in various sociological studies."

In Petitioner's Statement of the Case, Cinema Blue notes, in particular, ***State v. Anderson***, 322 N.C. 22, 32-34, 366 S.E.2d 459, 466, *cert. denied*, 109 S.Ct. 513 (1988) ["Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive. . . At best his study could be said to have focused on the availability of a very broad range of sexually oriented materials . . ." (emphasis added)], and ***United States v. Pryba***, 678 F.Supp. 1225, 1229 (E.D. Va. 1988), ["To be admissible . . . a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or words that are 'clearly akin' to the charged materials. (citations omitted) . . . The court has viewed all of these materials and is confident that the descriptive language fails to convey the impact of the visual image. For example . . . (t)here are no terms in the definition which inform the respondent that he or she is being questioned about materials which show, *inter alia*, (i) women's breasts and men's genitals in tourniquet devices; . . (iii) insertion of a large pipe into a woman's anus; . . . and (v) a nude woman's breasts being repeatedly jabbed and punctured by pins while she hangs in chains." (emphasis added)].

SUMMARY OF ARGUMENT

Pointing up the salience of the Fourth Circuit's comment that "the dispute is essentially one over the way in which the appellees intended to lay the foundation for the expert's testimony," is the fact that neither the ***Anderson*** nor the ***Pryba*** case requires the actual materials charged to be publicly exhibited in order for surveys based upon accurate and complete descriptions to be "validated" for admissibility. Implicit in the decisions of both courts is the ability of the trial judge to determine whether the experts' descriptions of the charged materials "convey the impact of the visual image." (***Pryba*** at 1229) Given this limited requirement, it becomes clear that the dispute is really over whether otherwise criminal conduct may be immunized simply because its motive is to prepare a defense to pending criminal charges. Such a promise of immunity is what was being requested of Gilchrist.

It would have been improper for the prosecutor to offer such premature assurances, based upon limited facts, prior to the postulated conduct, and without benefit of investigation of the ultimate events to fully inform prosecutorial discretion. Gilchrist's discretion, honesty, and propriety are pointed up by his response to the question on reasonable apprehension from the federal judge. It would not be unreasonable for any person to be apprehensive of violating a valid state law, such as by publicly exhibiting materials previously found to be obscene under an unchallenged state obscene exhibitions law.

There is nothing novel about the doctrine of federal abstention, nor about the way in which the Fourth Circuit applied it. It is clear that the District Court should have abstained from entertaining this action. This litigation was clearly an attempt by Cinema Blue to utilize §1983 to effect a direct, interlocutory appeal from the trial courts of the State of North Carolina to a federal district court. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." ***Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers***, 398 U.S. 281 (1970). This was recognized by the Fourth Circuit in its Opinion. (Pet. App. 25) The editor of the annotation to ***Perez v. Ledesma***, 401 U.S. 82 (1971), appearing at 27 L.Ed.2d 988, 991 aptly summarized existing law:

> The effect of ***Younger v. Harris*** and its companion cases . . . might best be summed up by Mr. Justice Stewart, who in his concurring opinion [in ***Younger***] declared the Supreme Court's holding to be that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of

> either injunction or declaration in an existing state criminal prosecution, and that such circumstances exist only when there is a threat of irreparable injury, both great and immediate. The Justice pointed out that a threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, or if there had been bad faith and harassment - official lawlessness - in a statute's enforcement. . . . (emphasis added)

Cinema Blue did not even allege the unconstitutionality of the underlying statute and, as noted by the Fourth Circuit, there is no evidence of prosecutorial bad faith or harassment. (Pet. App. 27) Further, the protection sought by Cinema Blue was based upon no previously recognized constitutional right. No person is, nor ought to be, immune from criminal prosecution for his alleged criminal acts. Such requested immunity is not a ground for equity relief since the lawfulness of the basis for a state court prosecution may be determined as readily in a criminal case as in a suit for an injunction. ***Stefanelli v. Minard***, 342 U.S. 117 (1951), and ***Grove Press, Inc. v. Evans***, 312 F. Supp. 614 (E.D.Va. 1970).

ARGUMENT

I.

THE FOURTH CIRCUIT COURT OF APPEALS DECISION REQUIRING ABSTENTION IS NOT IN DIRECT CONFLICT, BUT RATHER IS IN HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. THERE ARE CIRCUMSTANCES IN WHICH ABSTENTION IS APPLICABLE SHORT OF AN OUTRIGHT INJUNCTION AGAINST AN ONGOING CRIMINAL PROSECUTION, AND THIS CASE PRESENTS SUCH A CIRCUMSTANCE.

Federal District Judge McMillan, who entered the initial order imposing a preliminary injunction, indicated that his "initial reaction to the complaint was to abstain." (Pet. App. 6) This initial reaction occurred despite Judge McMillan's disapproval of abstention. In the District Court's Memorandum of Opinion supporting the grant of preliminary injunction (Pet. App. 6), Judge McMillan cites to his own article, McMillan, ***Abstention--The Judiciary's Self-Inflicted Wound***, 56 N.C.L.Rev. 527, 541 (1978). In that article he states that,

"[a]bstention . . . is . . . confusing, unrealistic and frustrating. . . . The theoretical concerns of federalism are once more paramount over the rights of man." Yet, as McMillan himself states in the cited article (at 542): "Normally, a previously pending criminal prosecution, plus certiorari, does provide a forum to assert constitutional claims." (Emphasis in original)

Nevertheless, with Judge McMillan's strongly stated disapproval of abstention as a backdrop, the District Court relied upon ***Doran v. Salem Inn, Inc***, 422 U.S. 922 (1975) in its decision not to abstain. (Pet. App. 6) Cinema Blue also relies on ***Doran*** (Pet. 9-10) and a line of similar cases on "threatened future prosecutions" as the basis for their claim that the decision of the Fourth Circuit is in conflict with applicable decisions of this court.

Yet, ***Doran*** does not stand for the simple proposition that future prosecutions escape the abstention doctrine. The facts of the ***Doran*** case were determinative, presented a narrow exception to abstention, and were entirely different from the instant case. ***Doran*** involved a provision of law challenged as unconstitutional on its face (not present here) and involved parties not directly allied to the defendants in a pending state criminal action. In this case Cinema Blue were the defendants in the State criminal trial for which preparation was being made. The very remedy sought in federal District Court had been sought and denied in the State Superior Court in the pending criminal action. That denial was appealable by the express provisions of N.C.G.S. 15A-1442 and N.C.G.S. 15A-1443. (Pet. App. 35)

Although the court in ***Doran*** chose not to abstain "on the facts of this (***Doran***) case," (emphasis added) the court nevertheless indicated that the question of whether injunctions of future prosecutions are governed by abstention principles had been reserved by ***Younger v. Harris***, 401 U.S. 37 (1971) and its progeny. The court in ***Doran*** (at 928) continued to reserve the question for future cases when it indicated that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the ***Younger*** considerations which govern any one of them. . . " The ***Doran*** court also quoted ***Samuels v. Mackell***, 401 U.S. 66, 73 (1971), which said that "[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical. . . "

In fact, the Court in ***Doran*** indicated that a federal court may not intervene by way of an injunction in a pending state criminal prosecution, in the absence of exceptional circumstances creating a threat of irreparable injury (422 U.S. at 930-931). Even the exceptional

circumstance in ***Doran*** that the challenged ordinance ". . . would prohibit the performance of the 'Ballet Africains and a number of other works of unquestionable artistic and socially redeeming significance" did not result in the Court allowing an injunction against a pending trial and was noted as the key factor even for allowing the exceptional injunction against future enforcement of the ordinance as to the parties not yet charged. ***Salem Inn, Inc. v. Frank***, 364 F. Supp. 478, 483 (1973). Further, the Court in ***Doran*** took pains to note:

> It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of ***Younger***.
>
> ***Doran v. Salem Inn, Inc.***, 422 US 922, 931 (1975).

This impairment of the state's interest in enforcing its criminal laws was conceded in the District Court's Memorandum of Opinion (Pet. App. 9), and is the reason why exceptions to the ***Younger*** policy of abstention have been very narrowly construed.

Each of the issues raised in the District Court could have been [and were] presented to the state tribunal. See ***United Books, Inc. v. Conte***, 739 F.2d 30 (lst Cir. 1984). Were the preliminary injunction below sustained, the federal courts would become a forum to determine probable cause to try any plaintiff in state court using the Civil Rights Act as a pretext for jurisdiction. As pointed out in the landmark case of ***Stefanelli v. Minard,*** 342 U.S. 117 (1951), to sanction such federal court intervention would be to expose every state criminal prosecution to insupportable disruption, since every question of procedural due process would invite a flanking movement against the system of state courts by resort to the federal forum. Such asserted unconstitutionality would provide ready opportunity which conscientious counsel might be bound to employ to subvert the orderly, effective prosecution of local crime in local courts. The court concluded that to suggest these difficulties is to recognize their solution. The court stated (at 122-123):

> (C)ourts of equity in the exercise of their discretionary powers should conform to this policy [abstention] by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; . . . If these considerations limit federal courts in retraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues? (emphasis added)

B.

YOUNGER ABSTENTION PRINCIPLES ARE APPLICABLE TO THE CASE AT BAR AND THE FOURTH CIRCUIT PROPERLY ORDERED THE DISTRICT COURT TO ABSTAIN IN THE ABSENCE OF PROSECUTORIAL BAD FAITH OR A CLEAR CONSTITUTIONAL VIOLATION.

Absent a sufficient showing of bad-faith harassment, invidious discrimination, or a challenge to the facial validity of the underlying statute, it can hardly be maintained that the requisites for preliminary injunction were met. As the District Court noted (at Pet. App. 7), the appropriate standard in the Fourth Circuit for interlocutory injunctive relief is a balance of hardship test, which turns upon the flexible interplay of four factors: probable irreparable harm to plaintiff without injunction, harm to defendant if injunction issues, likelihood of plaintiff's prevailing on the merits, and public interest. ***Blackwelder Furniture Co., Inc. v. Seilig Mfg. Co., Inc.***, 550 F.2d 189 (4th Cir. 1977); ***Joyner v. Lancaster***, 553 F. Supp. 809 (M.D.N.C. 1982)

Again, Cinema Blue did not allege the unconstitutionality of the underlying statute, and since even the seven materials not yet adjudicated to be obscene were the subject of indictments by the Mecklenburg County Grand Jury, it can hardly be maintained that the requisite for bad-faith harassment is present, i.e., absence of any reasonable likelihood of success in the prosecution. Nor is there any evidence of a pattern of invidious discrimination.

Cinema Blue further argues that the injunction against Gilchrist did not directly interfere with the pending state prosecution. Yet, the state Superior Court judge was well aware of the actions of both federal courts and inquired of the Attorney General of North Carolina as to their import prior to the criminal trial. As the Fourth Circuit noted (Pet. App. 24):

> (W)e cannot see how there could be any constitutionally protected right to obtain evidence for use in a pending state proceeding unless its use for that purpose were also thought to be constitutionally protected. . . . (N)ecessarily implicit in any such decree must be a judicial perception that the reason its procurement is constitutionally protected is because, more fundamentally, its use is. . . . Equity is no more properly invoked and exercised for vain, or potentially vain, endeavors in constitutional than other matters.

As stated in *Perez v. Ledesma*, 401 U.S. at 121:

> The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded. Moreover, federal intervention may disrupt the state proceeding through the issuance of necessary stays or the burdensome necessity for the parties to proceed in two courts simultaneously. Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process.

This is exactly what has happened in the instant action. The appeals of the criminal convictions of Cinema Blue are pending in the North Carolina Court of Appeals, and the asserted constitutional requirement for the admissibility of public opinion surveys is the primary issue there. As predicted by *Perez*, there has also been much that is unseemly in the taxing and sometimes exasperating necessity of proceeding simultaneously in two forums. This can be seen in the

claim of Cinema Blue to the Fourth Circuit that Gilchrist's appeal was pursued in such a manner as to interfere with Cinema Blue's criminal trial preparation, even though Cinema Blue was the federal plaintiff. This confusion of process can also be seen in the bootstrapping argument of Cinema Blue (Pet. 19-20) to this Court that, since a sufficient number of "focus group" showings were made during the pendency of the preliminary injunction to allow Cinema Blue to make a colorable proffer of expert testimony at the criminal trial, the resulting absence of prejudice from the state court's denial of the motion for a protective order is now unreviewable. Even were this to eliminate on appeal the essence of Cinema Blue's novel Sixth Amendment claim (which it does not), it certainly would have been possible to fully assign error to the state court's denial of the protective order had the District Court properly abstained in the first instance.

Nor is it required by any case cited to this Court that public exhibitions of the charged materials be held in order to validate sufficiently detailed descriptions of the charged materials to allow for the preparation of a potentially admissible proffer of expert testimony. Gilchrist did not object to making the materials available for the use of defense experts.

Thus, there is no probable irreparable harm to Cinema Blue. Even the proffer made in state criminal court based upon the showings that were held during the pendency of the injunction were ruled inadmissible as more prejudicial than probative. This ruling is the heart of the primary assignment of error in the state criminal appeal. There is no substantial likelihood of success on the merits. The constitutional claims are novel and unrecognized. There was no evidence of bad faith or invidious discrimination. Yet, there was conceded injury to the state through impairment of its ability to enforce its criminal laws, and there was injury to the public interest. The films screened to the public, by Cinema Blue's own admission, would not have been exhibited absent the erroneous injunction, and two were later found to be criminal obscenity by a state petit jury.

II.

THE SIXTH AMENDMENT DOES NOT IMMUNIZE OTHERWISE CRIMINAL CONDUCT SIMPLY BECAUSE ITS PURPOSE IS THE DEVELOPMENT OF EVIDENCE FOR THE DEFENSE OF CRIMINAL CHARGES.

A.

PUBLIC EXHIBITIONS OF MATERIALS ALLEGED TO BE OBSCENE ARE NOT THE ONLY MEANS OF CONDUCTING PUBLIC OPINION STUDIES FOR USE IN THE DEFENSE OF CRIMINAL OBSCENITY CHARGES AND ARE NOT PROTECTED OR COMPELLED BY THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Cinema Blue (Pet. 21) refers to the confrontation and compulsory process clauses of the the Sixth Amendment and cites several cases in an attempt to justify the claim of a novel Sixth Amendment immunity for public exhibitions of allegedly obscene material in order to lay the foundation for admissible public opinion surveys in defense of obscenity charges. Is not Cinema Blue unavoidably suggesting, in addition to the existence of an immunity, the ultimate right of a defendant accused of dissemination of obscenity to compulsory process for the attendance of the public at exhibitions of the charged materials? Is this right not the logical next step after the establishment of such an immunity? Would this not be the ultimate invasion of the province of the jury and the ultimate unnecessary subjugation of a longsuffering public to a repetition of criminal conduct?

Neither this Court, nor any other court of which Gilchrist is aware, or which Cinema Blue has cited, has ever held the existence of either type of Sixth Amendment immunity and/or right. The right that Cinema Blue asserts (Pet. 23) from ***Kaplan v. California***, 413 U.S. 115, 121 (1973) and ***Smith v. California***, 361 U.S. 147, 164-165 (1959) is merely "to enlighten the judgment of the tribunal . . . regarding the prevailing literary and moral community standards and to do so through qualified experts."

The type of immunized and (if constitutionally required) compelled public exhibitions urged upon the Court by Cinema Blue are not unavoidable and are not the *sine qua non* for a fair trial. As noted in ***Sedelbauer v. State***, 455 N.E.2d 1159, 1165 (Ind. App. 3 Dist.1983):

> While the United States Supreme Court has recognized that expert opinion may be used to define contemporary community standards, it has never required such in obscenity cases.... The trial court's refus[al] to admit any testimony on community standards... [did] not amount to a denial of due process."

Indeed, this Court has noted that "the subject of obscenity does not lend itself to the traditional use of expert testimony because such testimony is usually admitted only to explain to jurors what they otherwise would not understand." See ***Paris Adult Theater I v. Slaton***, 413 U.S. 49, 56 (1973). As stated in ***Paris Adult,*** "no such assistance is needed by jurors in obscenity cases." In ***Hamling v. United States***, 418 U.S. 87, 108 (1974), the court noted that in obscenity trials the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." So, ***Kaplan*** stands for no more than the proposition that expert testimony is not *per se* inadmissible in obscenity trials, and if competent, relevant, and appropriate, should be admitted to "enlighten the judgment of the tribunal."

Cinema Blue Petitioners base their assertion of the need for large exhibitions of the pornographic materials upon the decision in ***United States v. Pryba***, 678 F. Supp. 1225 (E.D. Va. 1988) and upon the decision of the North Carolina Supreme Court in ***State v. Anderson***, 322 N.C. 22, 366 S.E.2d 459, *cert. denied*, 109 S.Ct. 513 (1988). Yet, neither court required the validation of relevant polling questions by the actual showing of the charged materials. ***Anderson*** actually notes the proper admission of expert testimony without the type of predicate mass exhibition prayed for by Cinema Blue in this action.

Anderson sustained the inadmissibility of certain polling surveys because (at 32), "Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive.... At best his study could be said to have focused on the availability of a very broad range of sexually oriented materials..." (emphasis added).

Similarly, ***Pryba*** (at 1229) merely held that "(T)o be admissible . . . a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or words that are 'clearly akin' to the charged materials. (citations omitted) . . . The court has viewed all of these materials and is confident that the descriptive language fails to convey the impact of the visual image." Yet, the court clearly indicated the types of descriptions that would have been sufficient absent "validating" mass public exhibitions. (See Respondent's Statement of the Case for examples.)

The holdings in ***Anderson*** and ***Pryba*** merely indicate that surveys must use appropriate methodology and characterizations which adequately describe in sufficient detail the actual nature of the materials at issue in the prosecution. Thus, Cinema Blue's assertion that they would be unable to offer expert testimony without an injunction immunizing public exhibitions is absolutely false, particularly when weighed against Gilchrist's assertion to the state court that, "I think they can certainly provide this material to their expert witness." (4th Cir. J.A. 25-a)

B.

THE "DETERRENT EFFECT" OF VALID CRIMINAL LAWS DOES NOT CONSTITUTE BAD FAITH OR HARASSMENT, THE REQUISITES FOR WHICH ARE CLEAR AND NOT EVEN REMOTELY PRESENT IN THE INSTANT CASE.

With Gilchrist's consent to provide the materials to the defense as a backdrop, Cinema Blue's comparison of legitimate apprehension of prosecution to bad faith harassment or to prior restraint through wholesale seizures of every copy of a particular book are entirely specious. If this comparison held even a scintilla of validity, then no obscenity law, nor even a libel law, could stand for fear of prosecution deterring the dissemination of presumptively protected materials.

Cinema Blue complains that Gilchrist's conduct deprives them of their First Amendment right to freedom of speech. The District Court did not even address this issue, except to say that Cinema Blue "failed to address this claim in their brief in support of the motion for preliminary injunction and at the hearing; therefore, the court does not decide that issue." (Pet. App. 12)

Finally, the requisites for bad faith and harassment are abundantly clear from this court's own decisions. Again, in ***Perez v. Ledesma***, 401 U.S. 82, 85 (1971), the Court indicated that ". . . [O]nly in cases

of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction...is federal...relief against pending state prosecutions appropriate." See e.g., ***Kuqler v. Helfant,*** 421 U.S. 117, 126, n. 6 (1975), "'Bad faith' in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." No such finding has been made by the courts below, and no evidence was presented at the preliminary hearing to support any such allegation.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully urge this Court to DENY Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

This the 1st day of March, 1990.

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